(23,560)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 985.

ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MULBERRY HILL COAL COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 2, 1913.

1 At a Supreme Court, Begun and Held at Springfield on Tuesday, the First Day of October, in the Year of Our Lord One Thousand Nine Hundred and Twelve, within and for the State of Illinois.

Present:

The Honorable Frank K. Dunn, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable John P. Hand, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable George A. Cooke, Justice.
William H. Stead, Attorney General.
Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk.*

Be it remembered, to-wit, on the Tenth day of September, A. D. 1912, the same being one of the days in vacation before the term of Court aforesaid, a record of the proceedings in the Circuit Court of St. Clair County was filed by appellant, Illinois Central Railroad Company, in the office of the Clerk of the Supreme Court of Illinois in words and figures following, to-wit:

2 8527. 113. Mulberry Hill Coal Co. vs. I. C. R. R. Co. Filed Sept. 10, 1912. J. McCan Davis, Clerk of Supreme Court.

3 STATE OF ILLINOIS,
St. Clair County, ss:

At a Regular Term of the Circuit Court within and for the County of St. Clair and State of Illinois, begun and held at the Court House, in the City of Belleville, in said County of St. Clair, on Monday, the 14th day of September, A. D. 1908, it being the second Monday of September, A. D. 1908, according to the Act of the General Assembly, by the Hon. Chas. T. Moore one of the Judges of the Third Judicial Circuit of the State of Illinois, of which the said County of St. Clair forms a part the following proceedings were had, to wit:

Present:

Honorable Chas. T. Moore, Judge.
Chas. P. Cashel, Sheriff.
F. J. Tecklenburg, State's Attorney.
C. E. Chamberlin, Clerk.

4 Be it remembered that the following is a true and correct copy of the Præcipe for Summons, in the above entitled cause:

STATE OF ILLINOIS,
St. Clair County:

In the St. Clair County Circuit Court.

MULBERRY HILL COAL CO.
VS.
ILLINOIS CENTRAL RAILROAD CO.

Case. $20,000.00.

The Clerk of said Court will please issue summons as above directed to the Sheriff of said County to execute and returnable to the Sept. Term 1908, and oblige

MILLER, WINKLEMANN & OGLE,
Plaintiff's Attorney-.

Filed Sep. 1, 1908.
C. E. CHAMBERLAIN,
Circuit Clerk, St. Clair County, Ills.

5 Be it remembered that the following is a true and correct copy of Trespass Summons in the above entitled cause.

STATE OF ILLINOIS,
St. Clair County, sct:

The People of the State of Illinois to the Sheriff of St. Clair County, Greeting:

We command you to summon Illinois Central Railroad Company if it can be found in your County, to be and appear in the St. Clair County Circuit Court, on the first day of the next Term thereof, to be held at the Court House, in the city of Belleville, in said County of St. Clair, on the 2nd day of September 1908, then and there to answer unto Mulberry Hill Coal Company of a plea of trespass on the case, to the plaintiff's damages, as it says of the sum of Twenty Thousand Dollars; and do not fail, under penalty of what the law directs. And this writ you shall have at our said Court, with your return endorsed thereon.

Witness: C. E. Chamberlain, Clerk of the Circuit Court, and the seal hereunto affixed at my office this 1st day of September A. D. 1908.

[SEAL.] C. E. CHAMBERLAIN, *Clerk,*
By SMITH MYERS, *Deputy.*

Filed Sep. 1, 1908.
C. E. CHAMBERLAIN,
Circuit Clerk, St. Clair County, Ills.

6 Be it remembered that the following is a true and correct copy of the Sheriff's return endorsed on the back of the foregoing summons:

I hereby specially deputize George Wolf to serve the within writ this 1st day of September 190–.

CHAS. P. CASHEL, *Sheriff.*

STATE OF ILLINOIS,
County of St. Clair, ss:

Personally appeared before me, C. E. Chamberlain, Circuit Clerk, in and for said County and State aforesaid, George Wolf, Esq., who being duly sworn on his oath, states that he has duly served this writ by reading the same to and delivering a true copy thereof to J. J. Heidinger, Agent of the Illinois Central Railroad Company, the within named defendant, the president or other superior officers not found in my County *the within named defendant,* this 1st day of September 1908.

GEO. WOLF,
Special Deputy.

Subscribed and sworn to before me this 1st day of Sept. A. D. 1908.

C. E. CHAMBERLAIN, *Clerk.*
SMITH MYERS, *Deputy.*

Filed Sep. 1, 1908.

C. E. CHAMBERLAIN,
County Clerk, St. Clair Co., Ills.

7 Be it remembered that the following is a true and correct copy of order of Court, in the above entitled cause, to September Term A. D. 1908.

133.

MULBERRY HILL COAL CO.
vs.
ILLINOIS CENTRAL RAILROAD CO.

Case.

On the 14th day of September A. D. 1908, on motion of defendant, the time in which to plead in this cause is by the Court extended until the 2nd Monday of the Term.

And now on the 5th day of October A. D. 1908, come again the parties in this cause by their respective attorneys, and the defendant's demurrer to plaintiff's amended declaration is argued by the respective attorneys and is by the Court sustained, and on motion, the Court grants leave to plaintiff to amend its declaration.

And now, on the 12th day of December, A. D. 1908, it being the last day of the Term, the Court orders that this cause be continued.

8 Be it remembered that the following is a true and correct copy of Adjourning order at September Term, 1908, of Court:

STATE OF ILLINOIS,
County of St. Clair, ss:

In the Circuit Court, at the September Term, A. D. 1908.

And now, on t-e 12th day of December A. D. 1908, the Court orders that this Court do now adjourn until the Court in course.

9 Be it remembered that the following is a true and correct copy of Convening Order of Court at January Term 1909:

STATE OF ILLINOIS,
St. Clair County, ss:

At a regular term of the Circuit Court within and for the County of St. Clair and State of Illinois, begun and held at the Court House, in the City of Belleville, in said County of St. Clair, on Monday, the 11th day of January A. D. 1909, it being the 2nd Monday of January, A. D. 1909, according to the Act of the General Assembly, by the Honorable R. D. W. Holder, one of the Judges of the Third Judicial Circuit of the State of Illinois, of which said county of St. Clair forms a part, the following proceedings were had, to-wit:

Present:

Honorable R. D. W. Holder, Judge.
Chas. P. Cashel, Sheriff.
F. J. Tecklenburg, State's Attorney.
Smith Meyers, Clerk.

10 Be it remembered that the following is a true and correct copy of Order of Court at January Term 1909, in the above entitled cause:

#66.

MULBERRY HILL COAL COMPANY
vs.
ILLINOIS CENTRAL RAILROAD CO.

Case.

On the 16th day of March A. D. 1909, come the parties in this cause by their respective attorneys, and the issue being joined, the Court orders that a jury come, and twelve good and lawful men are chosen, selected and sworn according to law and the trial of this cause is begun, and the evidence not being concluded, the Court orders an adjournment until the following day at 9 o'clock A. M.

And now on the 17th day of March A. D. 1909, come again the parties by their respective attorneys and the trial of this cause pro-

gresses, and pending the trial the plaintiff asks leave of Court to withdraw a juror, to amend its declaration and that cause be continued for said amendment to declaration; which leave is by the Court granted on condition that the costs of this term of Court be taxed against plaintiff, and the Court orders that this cause be continued.

11 Be it remembered that the following is a true and correct copy of Adjourning Order of Court at the January Term A. D. 1909:

STATE OF ILLINOIS,
St. Clair County, ss:

In the Circuit Court, at January Term, A. D. 1909.

And now on the 2nd day of April A. D. 1909, the Court orders that this Court do now adjourn until the Court in Course.

12 Be it remembered that the following is a true and correct copy of Convening Order of Court at April Term 1909:

STATE OF ILLINOIS,
St. Clair County, ss:

At a regular term of the Circuit Court within and for the County of St. Clair and State of Illinois, begun and held at the Court House, in the City of Belleville, in said County of St. Clair, on Monday, the 13th day of April A. D. 1909, it being the Second Monday of April A. D. 1909, according to the Act of the General Assembly, by the Honorable R. D. W. Holder, one of the Judges of the Third Judicial Circuit of the State of Illinois, of which said County of St. Clair forms a part, the following proceedings were had, to-wit:

Present:

Honorable R. D. W. Holder, Judge.
F. J. Tecklenburg, State's Attorney.
Smith Myers, Clerk.
Charles P. Cashel, Sheriff.

13 Be it remembered that the following is a true and correct copy of Order of Court at the April term 1909, in the above entitled cause:

MULBERRY HILL COAL CO.
vs.
ILLINOIS CENTRAL RAILROAD CO.

Case.

On the 14th day of April A. D. 1909, the defendant's demurrer to plaintiff's amended declaration is argued on behalf of the defendant.

And now on the 15th day of April A. D. 1909, comes the plaintiff by its attorney and the defendant's demurrer to plaintiff's amended declaration is argued on the part of plaintiff and by the Court taken under advisement. And now on the 26th day of April A. D. 1909, the Court being now fully advised in and concerning the premises, the defendant's demurrer to plaintiff's amended declaration is by the Court overruled.

And now on the 18th day of May A. D. 1909, on motion the Court grants leave to plaintiff to file an amended declaration instanter and same is filed and the Court enters a rule on defendant to plead, answer or demur to same by June 1st, 1909.

And now on the 2nd day of July A. D. 1909, it being the last day of the present term of Court, the Court orders that this cause be continued.

14 Be it remembered that the following is a true and correct copy of Adjourning Order of Court at April Term A. D. 1909:

STATE OF ILLINOIS,
St. Clair County, ss:

In the Circuit Court, at the April Term, A. D. 1909.

And now on the 2nd day of July A. D. 1909, the Court orders that this Court do now adjourn until the Court in course.

15 Be it remembered that the following is a true and correct copy of the Convening Order of Court at the September Term, 1909:

STATE OF ILLINOIS,
St. Clair County, ss:

At a regular term of the Circuit Court within and for the County of St. Clair and State of Ilinois, begun and held at the Court House, in the City of Belleville, in said County of St. Clair, on Monday, the 13th day of September, A. D. 1909, it being the Second Monday of September, A. D. 1909, according to the Act of the General Assembly, by the Honorable George A. Crow, one of the Judges of the Third Judicial Circuit of the State of Illinois, of which the said County of St. Clair forms a part, the following proceedings were had, to-wit:

Present:

Honorable George A. Crow, Judge.
Charles P. Cashel, Sheriff.
F. J. Tecklenburg, State's Attorney.
Smith Myers, Clerk.

16 Be it remembered that the following is a true and correct copy of Order of Court to September Term, A. D. 1909, in the above entitled cause:

#66.

MULBERRY HILL COAL CO.
vs.
ILLINOIS CENTRAL RAILROAD CO.

Case.

On the 15th day of September, A. D. 1909, come the parties in this cause by their respective attorneys, and this cause being called for trial, and parties both announcing ready for trial, the Court orders that a jury come, and twelve good and lawful men are chosen, selected and sworn, according to law to try the issue now joined, and the trial of this cause is begun, and the evidence not being concluded, the Court orders an adjournment until the following day at 9 o'clock A. M.

And now on the 16th day of September, A. D. 1909, come again the parties in this cause by their respective attorneys, and Court being convened, the trial of this cause proceeds, and the jury after hearing all evidence and arguments of counsel, and being instructed by the Court, retire to consider upon their verdict, and the Court orders an adjournment until the following day at 9 o'clock A. M.

And now on the 17th day of September, A. D. 1909, come again the parties in this cause by their respective attorneys, and the Court being convened the jury return into open court the following verdict, to-wit: "We, the jury, find the defendant guilty and assess the plaintiff's damages at Seven Thousand Dollars ($7000.00)."

And now on the 4th day of October, A. D. 1909, comes the plaintiff in this cause by its attorney, and enters a remittitur
17 of $1967.00 from the verdict heretofore entered in this cause.

And now on the 6th day of October, A. D. 1909, come again the parties in this cause by their respective attorneys, and the defendant's motion for a new trial of this cause is argued by the respective attorneys, and is by the Court taken under advisement.

And now on the 22nd day of December, A. D. 1909, come again the parties in this cause by their respective attorneys, and the Court being now fully advised in and concerning the premises and the defendant's motion for a new trial of this cause is by the Court allowed, and the Court orders that a new trial be, and the same hereby is granted, and that the verdict heretofore entered in this cause be, and the same is hereby *is* vacated; and on motion the Court grants leave to plaintiff to amend its declaration in this cause, and orders that this cause be continued.

18 Be it remembered that the following is a true and correct copy of Adjourning Order of Court at the September Term, A. D. 1909.

STATE OF ILLINOIS,
St. Clair County, ss:

In the Circuit Court, at the September Term, A. D. 1909.

And now on the 22nd day of December, A. D. 1909, the Court orders that this Court do now stand adjourned until the Court in course.

19 Be it remembered that the following is a true and correct copy of Convening Order of Court at the January Term, 1910.

STATE OF ILLINOIS,
St. Clair County, ss:

At a regular term of the Circuit Court in and for the County of St. Clair and State of Illinois, begun and held at the Court House in the City of Belleville, in said County of St. Clair, on Monday, the 10th day of January, A. D. 1910, is being the second Monday of January, A. D. 1910, according to the Act of the General Assembly by the Hon. Geo. A. Crow, one of the Judges of the Third Judicial Circuit of the State of Illinois, of which the said County of St. Clair forms a part, the following proceedings were had, to-wit:

Present:

Honorable Geo. A. Crow, Judge.
Chas. P. Cashel, Sheriff.
F. J. Tecklemburg, State's Attorney.
Smith Myers, Clerk.

20 Be it remembered that the following is a true and correct copy of Order of Court at the January Term, 1910, of Court, in the above entitled cause:

MULBERRY HILL COAL CO.
vs.
ILLINOIS CENTRAL RAILROAD CO.

Case.

On the 11th day of January, A. D. 1910, on motion the Court grants time to the defendant until Friday next at 9 A. M. in which to plead to plaintiff's amended declaration in this cause.

And now on the 8th day of February, A. D. 1910, come again the parties in this cause by their respective attorneys, and the defendant's demurrer to plaintiff's amended declaration is argued by the respective attorneys and is by the Court overruled. To which ruling of the court the defendant excepts.

And now on the 14th day of February, A. D. 1910, on motion, the defendant's plea of general issue, heretofore filed, is by the Court extended to the last amended declaration of plaintiff.

And now on the 19th day of March, A. D. 1910, it being the last day of the present term, the Court orders that this cause be continued.

21 Be it remembered that the following is a true and correct copy of Adjourning Order of Court at the January Term, A. D. 1910.

STATE OF ILLINOIS,
St. Clair County, ss:

In the Circuit Court, at the January Term, A. D. 1910.

On the 19th day of March, A. D. 1910, it is ordered by the Court that this Court do now adjourn until the Court in course, with general leave to open deposition in all cases.

22 Be it remembered that the following is a true and correct copy of Convening Order of Court at the April Term, 1910.

STATE OF ILLINOIS,
St. Clair County, ss:

At a regular term of the Circuit Court within and for the County of St. Clair and State of Illinois, begun and held at the Court House in the City of Belleville, in said County of St. Clair, on Monday, the 11th day of April, A. D. 1910, it being the second Monday of April, A. D. 1910, according to the Act of the General Assembly, by the Honorable George A. Crow, one of the Judges of the Third Judicial Circuit of the State of Illinois, of which the said County of St. Clair forms a part, the following proceedings were had, to-wit:

Present:

Honorable Geo. A. Crow, Judge.
Chas. P. Cashel, Sheriff.
F. J. Tecklenburg, State's Attorney.
Smith Myers, Clerk.

23 MULBERRY HILL COAL COMPANY,
vs.
ILLINOIS CENTRAL RAILROAD CO.

1.

Be it remembered that the following is a true and correct copy of Fifth Amended Declaration in the above entitled cause:

MULBERRY HILL COAL CO.
vs.
ILLINOIS CENTRAL RAILROAD CO.

Case.

Mulberry Hill Coal Company, an Illinois corporation, plaintiff in this suit, complains of the Illinois Central Railroad Company a corporation, defendant in this suit, of a plea of trespass on the case.

From that whereas, on to-wit the first day of January, 1906, and from thence hitherto, defendant was possessed, using and operating a certain railroad, leading from Freeburg to East St. Louis in said county which said railroad was used by defendant for carrying passengers and freight, coal, etc., for hire from said Freeburg to East St. Louis and further. While said defendant was such carrier as aforesaid, using and operating passenger, freight and coal cars on said railroad tract, that on to-wit, the 30th day of September, 1906, and from thence hitherto, plaintiff was possessed of to-wit, six hundred thousand tons of coal and a complete coal mine with shaft, fixtures, machinery and appliances necessary to mine, hoist and dump on railroad coal car — cars on a switch near said mine the coal mined. That said coal mine, including shaft, fixtures, machinery and appliances aforesaid, were erected by plaintiff at the cost, and are of the value of, to-wit: Thirty Thousand Dollars; that plaintiff's said coal mine is situated on the east half of southwest quarter of section eighteen (18), township one (1) south, of range (7) west, St. Clair County, Illinois, said coal mine being adjoining defendant's said railroad track, on which track during all the time aforesaid defendant operated and moved railroad cars carrying freight
24 as well as passengers for hire for any and all persons desiring to ship coal and other freight. It was the duty of defendant at such place where freight was taken by it to furnish cars necessary to convey freight offered to it by persons ready and consenting to pay the compensation for the shipping of freight from Freeburg along the line of said railroad track to East St. Louis and further. That from the day and year last aforesaid hitherto defendant's said railroad was the only accessible mode and the only way of conveyance for the transportation and conveyance of large quantities of coal from plaintiff's said mine to East St. Louis. That on plaintiff's said premises and connected with said mine and defendant's said railroad track there was and is situated a railroad switch connected with the main track of said railroad, on which said switch defendant, as its custom had been since said mine was first opened hitherto placed empty coal cars for plaintiff to load the same with coal from plaintiff's said mine, and when said cars were so loaded plaintiff at the direction of its salesman, billed the same to the purchasers of said coal to whom the same had been sold by said salesman and to such points as it was instructed so to do by its salesman and defendant conveyed the same to East St. Louis and other points.

Plaintiff further avers that from the 30th day of September, 1906, hitherto, said mine was operated continuously every working day except Sundays, holidays and the days hereinafter set forth, when defendant failed to furnish cars as hereinafter stated. That at all times when plaintiff operated said mines as aforesaid it had 600,000 tons of coal underlying the east one-half of the south-
25 west quarter, also the northwest quarter and the northeast quarter, all in section eighteen (18), township one (1) south, range seven (7) west, St. Clair County, Illinois; enough employees, including miners, laborers, an engineer and mine manager, also mules, to mine, haul to the bottom of the shaft, hoist, dump on

defendant's cars and ship on defendant's railroad cars to East St. Louis two hundred tons of coal each working day until the output of said coal mine was increased as hereinafter stated to four hundred and twenty-five tons per day when the number of miners was increased accordingly; and until the output of said mine was thereafter further increased so as to mine and load five hundred and twenty-five tons of coal every working day, as hereinafter stated, when the number of miners was further increased accordingly.

Plaintiff further avers on the day and year last aforesaid, that defendant had notice that plaintiff's mine produced two hundred tons of coal each working day and had notice of the increase of the output — was increased as hereinafter stated.

Plaintiff further avers that at any and all times plaintiff offered to load defendant's cars with coal, and ship the same as aforesaid, plaintiff was ready and willing to pay the freight on coal shipped by plaintiff, of which defendant had notice.

Plaintiff further avers that on the day and year last aforesaid, and from thence hitherto, it was the custom and so understood, recognized and acted upon by plaintiff and defendant, that whenever cars were required to load coal at plaintiff's said mine, that then on the day before the day on which cars were required as aforesaid, plaintiff should give notice to defendant how many cars would
26 be needed and the date when they were required to be placed at said mine, as hereinafter stated.

Plaintiff avers that on each of the several days when defendant's cars were needed and proposed to be loaded with coal and transported as aforesaid, and notice as aforesaid had been given for cars, all as hereinafter set forth, there was a market for, and an opportunity to sell, on the cars, the amount of coal for which cars were requested and proposed to be loaded, and that the plaintiff would have so loaded cars if they had been furnished as requested. That if the cars had been furnished as requested, and loaded with coal, said coal so loaded could have been sold at said mine or in the market for a much larger amount of money than the aggregate expense of producing, transporting to market and selling said coal, including the purchase price, mining, loading, freight charges and commission to plaintiff's salesman; also including the rental value of said mine, worth $15.00 per day.

Plaintiff further avers that railroad coal cars when needed are indispensable to a successful operation of said mine, that without them the mine can not successfully be operated, and when defendant fails to furnish cars when needed and requested the mine must necessarily lie idle and all of plaintiff's employees at the mine will be out of work that day; that on the respective dates hereinafter set forth when no cars were furnished by defendant, by reason thereof the mine lay idle, plaintiff was obliged to pay the engineer and mine manager, together with paying for food for mules and the cost of 1½ tons of coal amounting together to the sum of $6.73, each day the mine so lay idle, while the output was 200 tons each working day, which amount was actually and unavoidably lost to plaintiff on each working day when the mine was not operated by reason

of defendant's failure to perform its legal duty to furnish
27 cars; until the expense and loss was increased, as hereinafter stated.

Plaintiff further avers that the miners working in said mine were hired and paid per ton for coal mined and loaded on the cars in the mine; said miners received no pay when the mine was not operated. That in addition to said miners to operate said mine it required, and plaintiff was compelled to employ a hoisting engineer at $85.00 per month, which equals $2.83 per day counting 30 days in a month, also a mine manager at $90.00 per month which equals $3.00 per day counting 30 days in a month; to use 1½ tons of coal to keep up steam for pumping water each day at a cost of 45 cents; to feed two mules at a cost of 45 cents per day; total necessary outlay and expenses paid $6.73 per day. This condition existed while the mine produced 200 tons of coal per day, whether the same was operated or not. That from the time the output of coal was increased as hereinafter stated from 200 tons per day, to 425 tons per day the expense for engineer, mine manager and feed for mules as well as coal used, was increased to $105.00 per month for engineer equal to $3.50 per day counting 30 days in a month, $100.00 per month for mine manager, equal to $3.33 per day, counting 30 days in a month and to 68 cents a day for feed for mules together with 45 cents per day for coal used as aforesaid—total $7.96. per day. The necessary expenditures of this last amount continued until the production of coal was increased from 425 to 525 tons per day, as hereinafter stated, when the necessary expenditure last aforesaid was increased by 23 cents per day for feed for mules, from which time the total daily expenditure for the purposes aforesaid amounted to $8.19 for each day when the mine necessarily lay idle.

1. That on the 10th day of January, 1907, plaintiff noti-
28 fied defendant that plaintiff had ready, was able and proposed to load, and needed defendant's coal cars on which to load 200 tons of coal at plaintiff's said mine on the 11th day of January, 1907; that on the day and year last aforesaid in the morning plaintiff's employees, the miners, engineer, mine manager and laborers and all the mine equipements and appliances were in readiness to operate said mine, hoist, load on coal cars and ship on that day to East St. Louis 200 tons of coal as aforesaid, which amount of coal, if the same had been loaded and shipped as aforesaid, could and would have been sold on that date by plaintiff's salesman to his customers for much more than the rental value or use of the mine for that day, the same being worth $15 per day; and also than the cost of production, transportation and sale, including the purchase price of coal, the mining, hoisting, loading on cars, freight and commission for selling the same, together with the necessary expenses of salary for the engineer, mine manager and for the feed for mules and coal used; and for a profit above all expenses of $22.50. But the defendant on the day and year last aforesaid failed and neglected to furnish cars as requested, or otherwise. By reason of the defendant's failure to so furnish cars plaintiff was prevented from operating said mine on that day and plaintiff's employees at the mine were

out of work; that notwithstanding plaintiff's engineer and mine manager were idle and out of work on that day plaintiff was obliged to pay said engineer and mine manager, feed the mules and use 1½ tons of coal as aforesaid, together amounting to $6.73; also plaintiff lost the use of the mine, its equipment and appliances on
29–130 that day of the value of $15.00, making a total loss to the plaintiff on that day of $21.73 which last amount of money was lost to plaintiff by reason of the failure of the defendant to perform its legal duty to furnish cars as aforesaid.

* * * * * * *

(Paragraphs 2 to 99, inclusive, of the declaration are omitted in printing per stipulation of counsel. See side page 338.)

131 This suit is brought to recover expenses necessarily paid out for wages to engineer and mine manager, feed the mules, and coal used on days when mine was laid idle as charged in declaration, and for rental value, use of the mine, while idle caused by defendant's failure to furnish cars as charged in the declaration, to-wit $2201.92/100.

To the damage of the plaintiff $10,000.00, and therefore, it brings this suit.

MILLER, WINKLEMANN AND OGLE,
Attorney- for Plaintiff.

Filed January 10th, 1910.

SMITH MYERS,
Circuit Clerk, St. Clair Co., Ills.

132 STATE OF ILLINOIS,
County of St. Clair, ss:

In the Circuit Court.

MULBERRY HILL COAL COMPANY
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

Case.

And the defendant, Illinois Central Railroad Company, by Kramer, Kramer & Campbell, its Attorneys, comes and defends, etc.; when etc., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, in manner and form as the plaintiff has thereof complained against it, and of this the defendant puts itself upon the Country, etc.

KRAMER, KRAMER & COMPBELL,
Attorneys for Defendant.

133 Be it remembered that the following is a true and correct copy of Order of Court in the above entitled cause to the April Term, 1910:

MULBERRY HILL COAL CO.
VS.
ILLINOIS CENTRAL RAILROAD CO.

Case.

On the 18th day of April, A. D. 1910, come the parties in this cause by their respective attorneys, and the issue being joined, the Court orders that a jury come, and twelve good and lawful men are chosen, selected and sworn, according to law, to try the issue now joined, and pending the trial, the defendant moves the Court to dismiss this cause for want of jurisdiction, which motion is argued by the respective attorneys and is by the Court denied, and the trial of this cause proceeds, and at the hour of the adjournment, the jury, having heard all the evidence and arguments of counsel, and having been instructed by the Court, retire to consider upon their verdict, and the Court orders an adjournment until the following day at 9 o'clock A. M.

And now, on the 19th day of April, A. D. 1910, come again the parties in this cause by their respective attorneys, and Court being convened, the jury return into open Court the following verdict, to-wit: "We, the jury, find the defendant guilty and assess the plaintiff's damages at $716.92," whereupon, the defendant moves the Court for a new trial of this cause.

And now on the 7th day of June, A. D. 1910, come again the parties in this cause by their respective attorneys, and the defendant's motion for a new trial of this cause is argued by the respective counsel and is by the Court overruled.

134 To which ruling of the Court the defendant excepts.

It is therefore ordered and adjudged by the Court that the plaintiff have and recover of and from the defendant the said sum of Seven Hundred Sixteen and 92/100 ($716.92) dollars. together with its costs in this behalf expended, and that it have execution therefore.

To all of which ruling- of the Court the defendant excepts and prays an appeal to the Appellate Court of Illinois, in and for the Fourth District which is by the Court allowed, provided it file an appeal bond in the penal sum of One Thousand ($1.000.00) dollars. with surety to be approved by the Clerk of this Court, in thirty Days, and bill of exceptions in Sixty (60) days from this date.

135 Be it remembered that the following is a true and correct copy of Adjourning Order at the April term, 1910:

STATE OF ILLINOIS,
St. Clair County, ss:

In the Circuit Court, to the April Term, A. D. 1910.

On the 2nd day of August, A. D. 1910, the Court orders that this Court do now adjourn until the Court in course.

136 Be it remembered that the following is a true and correct copy of Convening order of Court at the January Term, 1912.

STATE OF ILLINOIS,
St. Clair County, ss:

At a regular term of the Circuit Court within and for the County of St. Clair and State of Illinois, begun and held at the Court House, in the City of Belleville, in said County of St. Clair on Monday, the 9th day of January, A. D. 1912, it being the second Monday of January, A. D. 1912, according to the Act of the General Assembly by the Hon. Geo. A. Crow, one of the Judges of the Third Judicial Circuit Court of the State of Illinois, of which said County of St. Clair forms a part the following proceedings were had, to-wit:

Present:

Honorable Geo. A. Crow, Judge.
Wm. J. Mulconnery, Sheriff.
F. J. Tecklenburg, State's Attorney.
Smith Myers, Circuit Clerk.

137 Be it remembered that the following is a true and correct copy of Remanding Order from the Appellate Court, in the above entitled cause:

Reversed Order.

STATE OF ILLINOIS,
Appellate Court, Fourth District, ss:

At an appellate court, begun and held at Mt. Verron on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eleven, the same being the 28th day of March in the year of our Lord, one thousand nine hundred and eleven.

Present:

Hon. Robert B. Shirley, Presiding Justice.
Hon. Warren W. Duncan, Justice.
Hon. Harry Highbee, Justice.
A. C. Millspaugh, Clerk.

And afterwards, to-wit: On the fifteenth day of April, in the year of our Lord, one thousand nine hundred and eleven, an order was made by said Court in words and figures following, to-wit:

October Term, 1910.

No. 33.

MULBERRY HILL COAL COMPANY, Appellee,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Appeal from Circuit Court, St. Clair County.

On this day again the said parties and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid, and
138 in rendition of judgment aforesaid, there is Manifest Error in this: The trial — erred in refusing to admit evidence offered in behalf of appellant, as set forth in the opinion filed herein. Therefore, it is considered by the Court that, for that error, and others in the record and proceedings aforesaid, the judgment of the Circuit Court in this behalf rendered, be reversed, annulled, set aside and wholly for nothing esteemed, and that the motions heretofore made to reverse the judgment and remand said cause for new trial, be and the same are allowed; and the motion heretofore made to affirm the judgment and for *procedent* to be denied and that this cause be remanded to the Circuit Court of St. Clair County for such other and future proceedings as to law and justice shall appertain. And it is further considered by the Court that the Said Appellant recover of and from the said Appellee cost by it in this behalf expenses, and that Appellant have execution therefore.

I, A. C. Millspaugh, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, do hereby certify, that the foregoing is a true copy of the Final Order of said Appellate Court in the above entitled cause of record in my office.

In testimony whereof, I have set my hand and affixed the seal of said Appellate Court at Mt. Vernon, this 29th day of November in the year of our Lord, one thousand nine hundred and
139 eleven.

[SEAL.] A. C. MILLSPAUGH,
Clerk of the Appellate Court.

140 Be it remembered that the following is a true and correct copy of Adjourning Order of Court at January Term, 1912, of Circuit Court:

STATE OF ILLINOIS,
County of St. Clair, ss:

In the Circuit Court, at the January Term, A. D. 1912.

And now on the 30th day of March, A. D. 1912, the Court orders that this Court do now adjourn until the Court in course.

141 Be it remembered that the following is a true and correct copy of Convening of Court at April Term, 1912:

STATE OF ILLINOIS,
St. Clair County, ss:

At a regular term of the Circuit Court within and for the County of St. Clair and State of Illinois, begun and held at the Court house, in the City of Belleville, in said County of St. Clair on Monday, the 8th day of April, A. D. 1912, it being the second Monday of April, A. D. 1912, according to the Act of the General Assembly by the Honorable L. Bernreuter, one of the Judges of the Third Judicial Circuit of the State of Illinois, of which said County of St. Clair forms a part, the following proceedings were had, to-wit:

Present:

Honorable L. Bernreuter, Judge.
Wm. J. Mulconnery, Sheriff.
F. J. Tecklenburg, State's Attorney.
Smith Myers, Clerk.

142 Be it remembered that the following is a true and correct copy of Order of Court at the April Term 1912, in the above entitled cause:

#66.

MULBERRY HILL COAL COMPANY
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

Case.

On the 10th day of April A. D. 1912, come the parties in this cause, by their respective Attorneys, and this cause being called for trial and the issues being joined, the Court orders that a Jury come, and twelve good and lawful men are chosen, selected and sworn, according to law, to try the issues now joined in this cause, and the trial of this cause proceeds, and the evidence not being concluded, the Court orders that this Court do now adjourn until tomorrow morning April 11th, A. D. 1912.

And now, on the 11th day of April A. D. 1912, come again the parties in this cause, by their respective Counsel, and Court being convened, the trial of this cause proceeds, and at the close of all the evidence, the defendant, by the Counsel filed its motion to dismiss the suit. And the motion is denied; whereupon the defendant excepts, and the defendant also files its motion to instruct the jury to find the defendant not guilty. Thereupon the Court denies the defendant's motion, whereupon the defendant excepts. And the said Jury after hearing all the arguments of Counsel, retire, to consider upon their verdict, and, on the same day, said Jury return unto

open Court the following verdict, to-wit: "We, the Jury, find the defendant guilty and assess plaintiff's damage at One Thou-
143 sand Dollars ($1,000.00)".

And now, on the 3rd day of May A. D. 1912, come again the parties to the cause, by their respective Counsel, and the plaintiff remits the sum of Two Hundred Eighty Three and 08/100 Dollars ($283.08) from the amount of the verdict heretofore rendered herein by the Jury aforesaid.

And thereupon, this cause coming on to be heard upon the defendant's motion entered herein for a new trial in said cause, after arguments of Counsel and due deliberation by the Court said motion is overruled and a new trial denied.

Therefore, it is considered by the Court that the plaintiff, Mulberry Hill Coal Company, do have and recover of and from the defendant, Illinois Central Railroad Company, the sum of Seven Hundred Sixteen and 92/100 Dollars ($716.92) being the residue of the amount of damages in form as aforesaid by the Jury assessed, together with the costs and charges in this behalf expended and have execution -herefor.

Thereupon the defendant, having entered his exceptions herein, prays an appeal from the above judgment of this Court to the Supreme Court of Illinois, which is allowed upon filing herein its appeal bond in the penal sum of Fifteen Hundred Dollars ($1500.00), with sureties to be approved by the Clerk of this Court within forty (40) days from this date, sixty (60) days allowed defendant within which to file its bill of exceptions.

144 STATE OF ILLINOIS,
County of St. Clair, ss:

In the Circuit Court, to the April Term, A. D. 1912.

MULBERRY HILL COAL COMPANY
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

Case.

Appearances:

For the Plaintiff, Messrs. Miller and Winkelmann & Ogle.

For the Defendant, Messrs. Kramer, Kramer & Campbell and J. G. Drennan.

Be it remembered, that on the trial of this cause, at the above term of Court, the plaintiff to sustain the issue upon its part, introduced the following evidence, to-wit:—

145 EXHIBIT 1.

STATE OF ILLINOIS,
County of St. Clair, ss:

In the Circuit Court, to the April Term, 1912.

MULBERRY HILL COAL COMPANY
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

Case.

It is agreed by and between the parties to the above entitled cause that on the re-trial of this case in the Circuit Court of St. Clair County, either party may read from the transcript of the evidence of this case taken on the former trial hereof in the Circuit Court of St. Clair County any evidence offered by either of the parties in said case, subject to any objections that the opposite party may desire to interpose as to the relevance or competency of such testimony.

It is further agreed by and between the parties hereto that the parties to the suit are not limited to the evidence taken on the former trial of this cause, but either party may interpose any additional evidence it may desire to interpose on the trial of this cause.

Dated this 7th day of February A. D. 1912.

(Signed) J. O. MILLER,
WINKLEMANN & OGLE,
Attorneys for Plaintiff;
KRAMER, KRAMER AND CAMPBELL,
Attorneys for Defendant.

146 FRED NOLD sworn for the plaintiff, testified as follows:

By Mr. WINKLEMANN:

Q. What is your name?
A. Fred Nold.
Q. Where do you reside?
A. Freeburg, Illinois.
Q. How long have you resided there?
A. Ever since I was two years old.
Q. Don't say that; Can't you tell about your age?
A. Thirty-six years.
Q. What is your business?
A. I am a mine manager, superintendent of the Mulberry Hill mine.
Q. Where is Mulberry Hill Mine situated?
A. About a mile and a half north of Freeburg.
Q. In this county?
A. Yes, sir.

Q. Have you any connection with that mine, are you interested in it, if so, state how?

A. Yes, sir I am a stockholder in the mine and I am Treasurer of the company.

Q. How long have you been with such?

A. Ever since it has been organized.

Q. When was that now?

A. I think that wa- in 1905.

Q. That it was organized?

A. Yes, sir.

Q. When was the mine constructed, built?

147 A. It was started in the fall 1905, some time in August or September.

Q. Now tell us how the mine is located there.

A. It is this side of Freeburg.

Q. Tell about the location of the railroads, if there are any there.

A. Well, there is the Illinois Central Railroad runs right by it.

Q. Is there any other way, any other road in the neighborhood?

A. No, sir, there is no other railroad near there.

Q. How long have you known that railroad, the Illinois Central that runs there?

A. Well ever since I can remember.

Q. Don't say that now; we don't know whether you can remember from yesterday or when, how many years.

A. I should judge about thirty years any way, thirty-one.

Q. Now where does that road run, which way does it run from Freeburg?

A. Well, it runs through Freeburg and by the mine up toward Belleville here.

Q. And then where?

A. Into East St. Louis.

Q. And that road has been operating you say that long a time?

A. Yes, sir.

Q. Now state to the jury the situation of the coal mine in regard to the railroad, how are they connected there, if any?

A. Well, when we started to sink the mine we had the railroad company put a track in there for us, of course we had to pay

148 for it, we paid for it in advance and then we had to wait about six or seven months before they put the track in for us.

Q. Who constructed the switches that are there now?

A. They did; we have three switches connected with the Illinois Central Railroad.

Q. Who own- those switches?

A. Well we paid for them; the contract says they belong to the railroad company.

Q. You paid for them but they belong to the railroad company?

A. That is the way the contract reads.

Judge KRAMER: Have you that contract with you?

Mr. WINKLEMANN: Yes, we will show it after while.

Judge KRAMER: I would not state anything about it then.

The COURT: I would not state what the contract shows: we do not want that.

Q. Now I want you to tell the jury exactly the situation, how near this railroad goes to your mine and their switch connecting with it.

A. Well, our switch is right under our dumps.

Q. The dump is where you let the coal into the cars?

A. Into the car, yes, sir.

Q. You call that the dump?

A. Yes, sir the dump.

Q. What is that that goes on to the railroad main track now?

A. Well it is connected with a switch.

Q. What is the distance about?

A. From the dump to the Illinois Central Railroad?

Q. Yes.

149 A. Well, I should judge about a thousand feet I think.

Q. When did the railroad company construct that now, you say?

A. That was in 1906 in September 1906.

Q. Now tell the jury in regard to the business, how it was done when you wanted to ship coal and get cars, how did they come to you?

A. If we wanted cars we would order cars in the evening over the phone about three o'clock and then about half past four we would take a notice in writing of the same amount of cars to the agent at Freeburg.

Q. Who did you give that notice to?

A. To the agent.

Q. Whose agent?

A. The Illinois Central Railroad Company's agent.

Q. You transacted the business with that agent at Freeburg?

A. Yes, sir.

Q. Now state more definitely what kind of a notice and what was to be done, tell about that, how you served the notice and how many cars you needed, tell all about that, tell the whole thing.

A. Well, the railroad company gave each a mine rating, at that time we had a rating of 200 tons in the beginning.

Q. What do you mean by rating now, you know most of these gentlemen do not know anything about that; I know all about it, but these gentlemen do not; explain about that rating.

A. Well when we hoist coal for a certain number of weeks, three or four weeks, the agent of the Illinois Central at Freeburg wanted to know how many hours we worked and if we worked every

150 day, so he asked and then he would send a man around and take up the tonnage and the number of hours we worked, and would give us our rating accordingly; and they would rate your mine according to the number of hours you worked; then when our rating was 200 tons we would order six cars over the phone at three o'clock in the afternoon and then we would make out a notice in writing and give it to him, that is the company's agent; that is

Q. What was the undertaking now, when did you give notice when you wanted cars, tell about that?

A. Well, we would notify them in the evening, we would give them the order in writing, about half past four and tell them we would want say six cars, and then our rating was increased higher to 12 and then 14 cars.

Q. When your rating was six cars you knew that meant to carry 200 tons?

A. Yes, sir.

Q. And you gave the orders for that much?

A. For six cars.

Q. Now when you gave orders on the first day, when were those cars to come in?

A. We ordered them for the next day.

Q. Have you got all of the orders?

A. Yes, sir.

Q. I will ask you if you know the contents of the declaration the dates that are changed there when the notices were given?

151 A. Yes, sir.

Q. You know the dates of it, don't you?

A. Yes, sir.

Q. We got them from the notices that you served on them did we not?

A. Yes, sir.

Q. Are those the notices, have you got them here?

A. They are all in court here.

Q. And they are correctly stated in the declaration?

A. Yes, sir.

Q. That is you gave them a notice, now say on the first of January to deliver you cars on the next day, on the second?

A. Yes, sir.

Q. And on the second what was you to do?

A. On the second if we had the cars we would load them and then we would order cars for the next day again and so on.

Q. What was done with your coal when you had the cars loaded?

A. Why there was a shipment to East St. Louis and further, St. Louis, etc.

Q. You shipped them to East St. Louis?

A. Yes, sir.

Q. To whom did you ship them there, your agent?

A. Well, some were billed to East St. Louis and some to St. Louis or different places, some were billed to the different coal companies, anybody that wanted to use coal.

Q. You delivered them to the Illinois Central Railroad Company at your mine?

152 A. Yes, sir.

Q. And they would take them off?

A. Yes, sir.

Q. Now in regard to the freight, how was that paid?

A. Well, the people that bought the coal always took care of the freight, we would sell the coal there at the mine. Once in a while

there would be a car may be for certain reasons they would want us to pay the freight and we would pay the freight on it if necessary, but hardly ever that happened.

Q. How long before that time did you do business in that way?

A. Why from the time we loaded the first car, the last day of September 1906.

Q. Did the railroad company at any time suggest any different way or was it satisfactory with them, tell about that?

A. They never asked us to do any different way and there was never any complaint coming in.

Q. During the year 1907, that is the time you sue for, you understand?

A. Yes, sir.

Q. Well, you got cars during the year 1907 didn't you?

A. We got some some days, yes.

Q. Now during 1907 when you got cars, did you do the same business, did you transact the business in the same way, in the same manner that you did in 1906?

A. Yes, sir the same way.

Q. When you got cars?

A. Yes, sir.

153 Q. Now how many days was it during the year 1907 that you did not get any cars?

A. There were 99 days that we did not get any cars.

Q. Ninety-nine days during that year?

A. Yes, sir.

Q. Now I want you to tell the jury how you were fixed there for mining coal, what did you have there to operate?

A. Well, we had a head gear built there and we had plenty of coal purchased.

Q. How much coal did you have there?

A. I do not know how many, may be six hundred thousand tons purchased or so.

Q. Now you know where the mine is situated on the tract of land described in the declaration?

A. The mine is situated on the east half of the southwest quarter of section 18 Township one south Range Seven west.

Q. Now around that point you had how many tons of coal you say?

A. Well we had 500 acres, something over 500 acres.

Q. Now when you produced the 200 tons rating, how did you know that you had that rating from the company, that you knew you were entitled to 200 tons?

A. Why they notified us in writing.

Q. Have you got that writing?

A. The letter is there.

Q. Look at these documents, I believe they are marked Exhibits "A" "B" and "C" state if you know them?

154 A. We got one from the chief dispatcher and the other from the superintendent of the Illinois Central Railroad Company.

Counsel for plaintiff offered the notices in evidence which are as follows:

EXHIBIT "A."

CARBONDALE, ILL., *May* 31, 1907.

All Agents Mining Stations:

It has been decided to establish 200 tons as the minimum rating of any mine on our line. There are several mines on this Division which have a rating of less than 200 tons, and effective June 1st, the rating of these mines will be 200 tons per day.

This increase is in accordance with meetings held with the different operators on the various Districts of our line.

The mines on the St. Louis Division effected by this are as follows:

Belleville, Fred Murphy (Murphy)	100	tons.
" Hippard Coal Co. (Walnut Valley)	100	tons.
Freeburg, Mulberry Hill C. & M. Co	150	tons.
New Athens, Kolb Coal Co. No. 3	150	"
Marissa, Avery Coal Co. (Advance)	120	"
Coulterville, Coulterville Mining Co	120	"
Du Quoin, Jupiter No. 5	100	"
" Perry County Coal Co	100	"
De Sota, J. L. Cully	100	"

I enclose herewith enough copies of this letter for each mine at your station.

155 Yours truly,

CHIEF DISPATCHER.

Copy. AEC GWB JDB WMB GAR CAC WMC.

EXHIBIT "B."

I. CARBONDALE, ILL., *Sept.* 17, 1907.

L. C.—W. B. H.

Avery Coal & Mining Co., St. Louis, Mo.

GENTLEMEN: I beg to advise you that the tonnage which has been produced at your Mulberry Hill Mine, during the past month has demonstrated to us, that the rating should be increased and we have increased the same from 200 to 425 tons per day, and made it effective Sept. 1st.

When you are able to produce more coal than this, we will take pleasure in making a further increase.

Yours truly,

A. E. CLIFT,
Superintendent.

Copy—Agents Mining Stations, with a copy attached for each mine at their station.

Copy—CLE OSK FHH CWB GWB WMB CAC GHW WMC.

156 EXHIBIT "C."

I. C.—T. S. S. S. CARBONDALE, ILL., *Nov.* 7, 1907.

Mulberry Hill Coal Co., Freeburg, Illinois.

GENTLEMEN: I beg to advise that the tonnage which has been produced at your mine during the past month has demonstrated to us that the rating should be increased and we have increased the same from 425 to 525 tons per day, and made the same effective November 1st.

When you are able to produce more coal, than this, we will take pleasure in making a further increase.

Yours truly,

A. E. CLIFT,
Superintendent.

Copy to Agents Mining Station, with a copy attached for each mine at their station.

Copy to CLE OSK FHH CWS GWB GSR WMB WHA GHW JLE.

157 Q. Now you say you had the mine in operation, tell us all about what you had there?

A. Well, we had mules.

Q. Tell everything all about it to run this thing completely?

A. Well we had plenty of men to hoist the amount of coal; we could load the amount of coal we had ordered car for and we had the equipment there, engine and hoisting apparatus, tracks and mules and all that we needed to load that amount of coal.

Q. A complete outfit?

A. Yes, sir.

Q. When was it done, when you wanted cars what did the railroad company do, suppose on the first you ordered cars to be loaded on the second, what would the railroad company do in response to that, when would they send you cars?

A. They would set them in on our track to load, that is whenever they had any for us.

Q. They would give them to you on your track there?

A. Yes, sir.

Q. Where you loaded them you say?

A. Yes, sir.

Q. Who took them away from there?

A. Why they took them away from there with their engine.

Q. Who, the railroad company?

A. Yes, sir, I guess it was, their engine there.

Q. Who did you give these notices to when you wanted cars?

A. To the Illinois Central Railroad Company agent at the depot at Freeburg.

158 Q. Does this letter refer to your mine?

(Handing witness a letter dated April 11, 1907, addressed to Jas. O. Miller, and signed by A. E. Clift, Superintendent.)

A. Yes, sir.

Counsel for plaintiff offered the letter in evidence.

Objected to by counsel for defendant on the ground that it has no bearing on this case.

The COURT: I will not rule upon this question at this time.

Q. Now state if you were in a position to load these 200 tons of coal daily when you demanded them whether you had the coal on hand?

A. We always were.

Q. What was the result if the cars did not come?

A. Well, if we did not get any cars we just lost out the day, we had to be idle and then we would have the expense of the engineer and the mine manager and the mules had to be fed and the coal we had to use for pumping, etc.

Q. When did you commence to ship these 200 tons?

A. That was the latter part of 1906.

Q. The railroad company had notice of that then?

A. They notified us at the time that our rating would be 200 tons.

Q. Now then you say you have served notice on them as stated in the declaration here of that date for the number of cars set forth there; you have the written notices here haven't you?

159 A. Yes, sir, they are here.

Q. Have you compared them and do you know that the declaration corresponds with your notices?

A. Yes, sir.

Q. You have got them there?

A. Yes, sir.

Q. Now here is a charge on the 10th of January 1907, that you notified the defendant that you were ready to load 200 tons?

A. Yes, sir.

Q. On the 11th?

A. Yes, sir.

Q. Now what took place on the 11th, did you get any cars or not?

A. We did not get any cars to load for the 11th.

Q. What condition were you in then on the 11th day of January?

A. Consequently we were idle on that day then.

Q. Were you ready to load them?

A. Yes, sir.

Q. Did you get any cars then?

A. No, sir, we did not get any cars on the 11th.

Q. What was the result?

A. Well, the result was we could not load any; we did not get any cars and we had the expense on hand and had the men laying idle for that day; we had the engineer to pay and the pit boss to pay and the mules had to be fed just the same, and we had the pumping.

160 Q. Now the expense that you had that day when you were lying idle, what was your expense on that day and what for, how did it occur?

A. The expense on that day was $6.75.

Q. Explain that to the jury now, for what?

A. Well, now the engineer and pit boss had to be paid a salary, he was paid by the month, and if we did not have any cars to load they had to be paid just the same, the mules had to be fed, and we had to do the pumping and use fire coal to raise steam.

Q. How much was the salary of these men that you had to pay?

A. Well, when we had a rating of 200 tons the pit boss for $90 and the engineer got $85 a month.

Q. What did that amount to a day?

A. That amounts to the pit boss $3.00 and the engineer $2.85.

Q. Now you say the expenses were six dollars and some cents; what were the other expenses for?

A. There was 45 cents for feeding for two mules and 45 cents for a ton and a half of fire coal.

Q. That you would have to use?

A. To raise steam.

Q. When you were lying idle?

A. Yes, sir.

Q. Now was there any other loss that you had on that day?

A. Well, the mine was lying idle there, all the money we spent for equipping up the mine.

161 Q. You had invested how much there, you say?

A. About thirty thousand dollars.

Objected to by counsel for defendant as immaterial.

Objection sustained by the court.

To which ruling of the court the plaintiff by its counsel then and there excepted.

Q. Well what was the reasonable value for the use of that mine?

Objected to by counsel for defendant as improper.

The COURT: Go on with something else for the time being, if you will; we will come to that matter later on; if you want it I will pass on it now, but I would prefer to have you take up something else for the time being.

Q. Now that was the expense you paid the servants by the month the six dollars and something at so much per month six dollars and how much?

A. $6.73.

Q. That was the expense that you necessarily had to pay for how many days up to the time that your tonnage was changed?

A. For sixty-one days.

Q. When the tonnage was changed what was the expense then?

A. When the tonnage was changed it was $7.96.

Q. Now was that changed a third time when your rating was made differently?

A. We were raised to 525 tons and then the expense was $8.19 on the days we did not get any cars.

Q. For days when you had to lay idle?
162 A. Yes, sir.
Q. Now you laid idle altogether how many days?
A. Ninety-nine days altogether.
Q. In that year?
A. Yes, sir.
Q. During the year 1907?
A. Yes, sir.
Q. Did I ask you how much your expenses were when you were raised to a rating of 425 tons a day?
A. Yes, sir, it was $7.96 *cents* when the rating was 425 tons.
Q. Do you remember when the rating was increased to 525 tons?
A. November 1st.
Q. Up to what time now?
A. Well up to—for that year.
Q. For December?
A. Yes, sir.
Q. The last of your charges, I believe, was in December, was it?
A. Yes, sir.
Q. What date in December?
A. The 21st of December.
Q. Was that the last or not?
A. The 23rd of December.
Q. That was the last date when you demanded cars and got none?
A. Yes, sir, that was the last date we did not get any cars, on the 23rd.
Q. Have you figured up the amount of expenses that you have there detailed to the jury, the gross amount?
A. Yes, sir.
163 Q. That you paid out necessarily?
A. The amount is $716.92.
Q. That was what you paid out on those days to the engineer and the others who worked by the month?
A. Yes, sir.
Q. You had to pay them whether the mine was working or not?
A. Yes, sir.

Mr. WINKLEMANN: Now I ask the court to instruct the jury before I turn the witness over that the admission is made that all these different dates for the 99 days alleged in the declaration are the same as the first date which he has detailed here.

Judge KRAMER: The stipulation that is made here is this, that the proofs of the items as to the first assignment of damages, shall extend to all the assignments of damages in the declaration without consuming the time by introducing specific proof as to each one of them; I mean as to the demand made by the plaintiff for cars and the failure of the company to supply them, and the amount paid out by plaintiff for services.

Mr. WINKLEMANN: Who was their agent during all that time?
A. Mr. Moesser.
Q. Who was your sales agent?
A. Why Albert J. Avery.

Q. Now tell the jury, if you had the coal, how you know that the expenses would have been covered, tell about that, tell what
164 knowledge you have about that?

A. I do not quite understand you on that question.

Q. Tell the jury, if you had received the cars as you demanded them, that is the 99 times you did not get them, if you had received these cars could you have sold the coal.

Objected to by counsel for defendant on the ground that there is no question of that kind involved in the declaration.

Mr. WINKLEMANN: That is alleged in the declaration. We have alleged in the declaration that we could have sold enough of that coal to cover the expenses.

Mr. KRAMER: What I mean there is no allegation in the declaration of loss of profits.

Objection withdrawn by the defendant.

Q. Now, if the cars had been furnished to you and you had filled them, how do you know that you could have covered the expenses?

A. Well, I know how much it would cost a ton to produce the coal and I know what the market price was at that time; of course, if you deduct the cost per ton from the market price per ton, that will make the balance.

Q. Now, when you figure out all the expenses attending the sale and everything, would that have covered the expenses?

A. Why certainly.

Q. Do you know what coal sold for about that time, January 10th?

Objected to by counsel for defendant for the reason that the witness has not shown that he knows anything about that of his own knowledge.

165 The COURT: If he does not know he cannot testify to it; he may state whether he does know or not.

Mr. WINKLEMANN: He knows what they sold for, he is one of the plaintiffs that sold them.

The COURT: You may ask him.

To which ruling of the court the defendant *of* its counsel then and there excepted.

Q. Do you know what coal sold for at that time?

A. Yes, sir I do.

Q. Well, state what they sold for on the tenth of January?

A. We were getting $1.05 for lump coal and 50 cts. for nut and pea coal at that time. That was the market price at that time.

Q. Now the price of that amount of coal, 200 tons per day would amount to how much, what would it cost to produce 200 tons of coal at that time?

A. We would have to get $169.50 so that left a profit of $37.

Objected to by counsel for defendant.

Mr. WINKLEMANN: We do not care about the profit; all we want to know is that it would have brought enough to pay the expenses, that is the idea.

Q. Was there enough there to pay the expenses?
A. Yes, sir, there was.

Cross-examination by Judge KRAMER:

Q. Let me see, what position did you hold with this company during this time, in the year 1907?
166 A. I was superintendent.
Q. You were superintendent?
A. Yes, sir, or mine manager, also.
Q. The Mulberry Hill Coal Company is a corporation, is it?
A. Yes, sir.
Q. Who is President of the company?
A. Why William Randle was at that time.
Q. Who was Secretary?
A. Well, I was Secretary and Treasurer.
Q. Did your company the Mulberry Hill Coal Company sink that mine?
A. Yes, sir.
Q. They sank the mine?
A. Yes, sir.
Q. And when did they begin operating it, you say?
A. Well, we sunk the mine in the fall of 1905 and we started taking coal out from that time on, that is small amounts, for wagon use.
Q. You operated the mine during the year 1906?
A. Yes, sir.
Q. When did you begin to operate as a railroad mine?
A. We loaded the first car on the last of September, 1906.
Q. Now on the first day of January, or on the tenth day of January, when this complaint started here, you had a rating of 150 tons did you not?
A. No, sir, we had a rating of 200 tons.
167 Q. How did you get that rating of 200 tons where did you get that?
A. We got it from the railroad company.
Q. Have you in your possession anything from the railroad company stating that you had a rating at that time of 200 tons, have you anything in your possession that shows that, at the beginning of the year 1907, showing that your rating was 200 tons a day?
A. Well, I have not now but we did have.
Q. Do you know what became of that?
A. No, sir, I do not. I did not expect anything like this to come up or we might have saved them.
Q. You have not it at all?
A. No, sir.
Q. Now during that year, commencing with the beginning of the year, you have complained here that on the 10th of January, 1907, at that time you say Mr. Avery was the sales agent of your company?
A. Yes, sir.

Q. Where was he located?
A. In St. Louis.
Q. He was not stationed at the mine at all?
A. No, sir.
Q. He was not interested in your company, either as a stockholder or otherwise?
A. No, sir.

168 Q. Now, in what way did he handle the coal; just explain to the jury how he would make the sales?

A. Well, he was our salesman and in the morning we would notify him how many cars we had and so he would take the numbers of the cars and the number of them, and in the evening about three o'clock or so he would call us up every day and give us the billing.
Q. He would tell you where he wanted these cars billed to?
A. Yes, sir.
Q. And what did you do then?
A. We billed them out, we billed the cars out over the phone to the agent at Freeburg.
Q. You would request the agent at Freeburg to bill them would not you?
A. Yes, sir, they would be shipped to a certain place, and in the evening at half past four we would take the notice in writing that we would have the number of cars on that stating where they were supposed to be billed to.
Q. You would give directions then in writing where they were to go to?
A. Yes, sir.
Q. That would be according to the instructions you had received from your sales agent Mr. Avery?
A. Yes, sir.
Q. Now you say that you could have sold, all you know about it being sold—well let us take the tenth of January you say you ordered cars for the 11th, where were you selling coal during that time?

169 A. I will have to look that up.

Q. Now on the 11th of January, 1907, when you wanted to do some shipping, where were you selling coal then?
A. Well, we did not ship any cars that day, we did not have any cars.
Q. Did you ship any on the tenth?
A. On the tenth, yes, sir.
Q. Where were you billing coal then?
A. We shipped that to the Avery Coal and Mining Company on the 10th.
Q. Where?
A. At 16th street.
Q. Where?
A. At St. Louis, Mo.
Q. Now take on the 12th, did you ship any coal then?
A. Yes, sir on the 12th—We shipped that to the Whitnell Terra Cotta Company.

Q. What city is that?
A. Out in Missouri.
Q. In the State of Missouri?
A. Yes, sir, well right on the outskirts of St. Louis.
Q. Now you wanted some cars and you made a demand for 200 tons of coal in cars on the 10th to be delivered to you on the 11th you would have loaded them you say, that day, if you had had them?
A. Yes, sir.
Q. Where would you have shipped that coal to?
A. Well according to where the agent would direct us.
170 Q. Where would the directions have shown, where would he have directed you to ship it?
A. Well, it may have been to his yard, it may have been to some other yard—that would be the next day.
Q. You do not know, do you at all?
A. Why certainly we would know.
Q. You would know, but you don't know do you?
A. Well, I do.
Q. Then where was it to go now?
A. I know that he needed some coal the next day, that was the reason we ordered the cars, he wanted it.
Q. Where did he want it, where would he want it to be shipped to?
A. Well, I know that he wanted cars of coal that day; just where to I would not say.
Q. You won't say?
A. No, sir, I could not say just where he wanted the cars.
Q. You could not say whether he could have sold it, you do not know do you?
A. Yes, sir.
Q. Now where could he have sold it, to whom could he have sold it?
A. Well, he certainly could have sold it or he would not have told us to order any cars that day.
Q. Is he the man that told you about ordering cars from the railroad company?
A. We told him to sell our coal.
Q. You told him to sell your coal, but when you testified
171 here in chief that if you had these cars and got the 200 tons of coal you could have sold it and got enough money to cover the expenses, when you testified that, how do you know you could have sold it?
A. Well, he is the man that sold it to the Terra Cotta Company and I know he could have sold more too.
Q. That is merely your conclusion because he always did sell the coal that you shipped to him?
A. That is what he did.
Q. Would you know where the coal was to go to before he gave you the billing?
A. Did we know where it was to go?
Q. Why did you not ship it down to him and let him dispose of it?

A. He was selling different coal; he was selling his own coal and different coal mines.

Q. Mr. Nold, give the places where you were selling coal during the year 1907?

A. That record there will show that.

Q. That will show the persons to whom you were selling coal in 1907?

A. Yes, sir.

Q. Well, read them off, a few of them, tell us where you were selling coal; just go through there and tell us where you were selling coal.

A. Well, there is Armour & Co. and the Bessener Coal Co.

Q. Where is the Bessener Coal Company, where was that?

A. They were billed to East St. Louis mostly.

172 Q. Go ahead, now, let us see some more.

A. The Avery Coal & Mining Company.

Q. Where would they be billed to?

A. That was mostly to St. Louis, some was billed to East St. Louis and may be re-billed.

Counsel for plaintiff objected to the evidence as immaterial.

Objection sustained by the court.

To which ruling of the court the defendant by its counsel then and there excepted.

Q. Where were you billing most of your coal during the year 1907?

A. Well, Avery seemed to be getting most of it.

Q. I know, but where did you bill most of it?

A. Why mostly to the coal yards.

Q. Where were his yards?

A. 16th street.

Q. In the city of St. Louis?

A. Yes, sir.

Q. In the State of Missouri?

A. Yes, sir.

Q. And that is where most of it went during that year?

A. Well some of it was sold to the railroad at that time.

Q. Which?

A. Some of it was sold to the Illinois Central R. R. Company.

Q. I know, but you say most of it, the majority of it, the greater portion of it went to the Avery yard did not it?

A. Well, not the majority, a part of it.

173 Q. What part, about what part?

A. Well, may be a third or a fourth of it.

Q. How much of it went to the City of St. Louis would you say during that year?

A. Well, nearly all of it went there.

Q. Now you say your mines are located about a mile and a half this side of Freeburg?

A. Yes, sir.

Q. There is no station there where your mine is located is there?

A. Yes, sir, the station of Freeburg, yes, sir.

Q. I mean right there at the mine there is no station on the railroad there, is there?

A. Well, there is no passenger station there, no, sir.

Q. I say, there is no station there, there is no other business transacted there is there except the business with your coal company, that is the only business isn't it?

A. Yes, sir.

Q. That is at that time?

A. Yes, sir.

Q. Where is the agent located that transacted the business with your coal company?

A. At Freeburg.

Q. When you shipped coal from your mine, where is it billed, where is the billing made out and by what agent of the railroad company?

174 A. The billing that we take up there I think is made out by the agent at Freeburg, we give it to him.

Q. You give him the billing instructions and he makes it out at his office in Freeburg?

A. Yes, sir.

Q. When you order this billing done and made out by the railroad agent at Freeburg, what time of the day?

A. Well, we give him the billing about three o'clock over the phone, and then at half past four we take up the true billing in writing.

Q. Now that is for the cars you have already loaded and ready to go that evening?

A. Yes, sir. And we give him the orders for the next day.

Q. Then there are two different things there at the same time; you give him instructions about what you want done in the way of furnishing cars the next day don't you?

A. Yes, sir, at the same time.

Q. At the same time?

A. Yes, sir.

Q. You first phone over to him about three o'clock in the afternoon of the cars you want the next day don't you?

A. Yes, sir.

Q. At that time, of course, the coal has not been mined yet, has it?

A. Yes, sir, it has.

Q. What do you mean by *meaning* mined?

A. It has been done till three o'clock.

Q. What has been done?

175 A. We are nearly always done working by three o'clock.

Q. What has been done in the way of mining the coal up to that time?

A. Do you mean in the way of hoisting.

Q. What has been done in the way of shooting down, or did you have machines in that mine or shoot from the face?

A. No, we had no machines, the men were all done about three o'clock.

Q. The way you ran your mine there at three o'clock in the afternoon what had been done in the way of mining coal that you intended to load the next day?

A. Well, up to about half past two or so; when we had a rating of six cars, about half past two we would be done loading cars, and by three o'clock we would be done hoisting all the coal.

Q. That had been shot down the day before had not it?

A. No, sir, not all, a part of it.

Q. A part of it?

A. Yes, sir.

Q. Now, what had been done with reference to the coal that you intended to load the next day?

A. Well, we would load the cars the next day, we would have to shoot a part of it down.

Q. Would it be already shot down when you ordered the cars?

A. Part of it, partly.

Q. And part would not?

A. Yes, sir.

Q. A part of it had to be shot down?

176 A. Part of it, yes.

Q. And what would have to be done after that?

A. That same day?

Q. Well, that day or the next day before you had it ready to put it on the railroad cars.

A. Well, it had to be loaded up of course, they would have to put it into the boxes.

Q. Put it in cars down below, would not it?

A. Yes, sir.

Q. Then what would have to be done with those cars?

A. They would have to be hoisted up and dumped.

Q. The cars would have to be brought from the rooms to the bottom before they were hoisted, would they not?

A. Yes, sir, well they would be loaded that day and taken to the bottom and put on the cage and hoisted.

Q. They would have to be hauled from there to the cars or the bottom of the shaft and hoisted and then loaded into the cars?

A. Yes, sir.

Q. And that work would have to be done after you ordered the cars would not it?

A. Yes.

Q. How would you know how many cars to order for the next day how many cars you would load?

A. How did we know?

Q. Yes.

A. We had plenty of coal on hand to load them.

177 Q. You would know the number of miners you had at work would you not?

A. Yes, sir, and at the same time in the evening, we would never have a full day, we would have may be all the way from 15 to 25 boxes already loaded at the bottom ready to hoist out.

Q. How many cars would that load?

A. Well, 25 boxes would load a car and a half, our boxes hold two tons.

Q. How often would you have those already down there at the bottom?

A. We would have them down there every evening, there was not a day I don't believe but what we had the bottom filled up.

Q. You would always have that done?

A. Yes, sir.

Q. Would you do that before you ordered the cars?

A. Well, we did that, we would load the cars first and then fill up the bottom afterward.

Q. Would that be after or before?

A. That would be about half past two or three o'clock.

Q. And state whether that would be before you ordered the cars or afterwards?

A. That would be before mostly.

Q. Mostly before?

A. Yes, sir.

178 FRED NOLD, recalled by the defendant for further cross-examination, testified as follows:

By Judge KRAMER:

Q. I believe you stated Mr. Nold, in your examination in chief, and stated also in cross examination that that Mr. Avery was your sales agent?

A. Yes, sir.

Q. For the sale of your coal, the output of your mine during the year 1907?

A. Yes, sir, he did.

Q. And had authority to sell all your output?

A. Yes, sir.

Re-examination by Mr. WINKLEMANN:

Q. Now let us see if we understand you right when you say you loaded the cars, in what manner was that done; how did you prepare the coal, did you prepare them the day before you wanted to load them or the day you wanted to load them?

A. Well, some were prepared the day before.

Q. Nor suppose you gave notice on the first that you would load the second?

A. We prepared it on the first, yes, sir.

Q. And that you loaded on the second on the cars?

A. Yes, sir.

Q. How long was that done, how long was that the practice, right along from the beginning?

179 A. Ever since I have been around mines we have been working that way.

Q. I am talking about your mine now?

A. Yes, sir, even since we started the mine.

Q. When you gave directions to the agent there, you always did business with the agent and no one else did you?
A. Yes, sir, with the agent.
Q. You gave directions where the coal was to go to?
A. Yes, sir.
Q. Then he made out the bills after you gave him the names?
A. Yes, sir.
Q. Was there ever any objection by the agent as to that way of doing business?
A. There never was.
Q. And the parties that received the coal were to pay for the freight?
A. Yes, sir.
Q. Did he ever make objection to doing that business in that way?
A. Not once.
Q. When you notified them for instance to bring cars on the second what time did they bring them?
A. They would usually bring them in during the night sometime.
Q. During the night from the first to the second?
A. Yes, sir.
Q. So they would be there in the morning?
A. They would be there in time, yes, sir.
Q. Where did they bring them or put them, on what track?
180 A. They would put them on our track at the mine.
Q. Right where they was to be loaded?
A. Yes, sir.
Q. Was there ever any change made in that respect?
A. No, sir.
Q. Where did you get the figures from that the coal if they had been loaded on the cars, the days that the cars did not come, if they had been loaded, where did you get the figures from of the price at that time?
A. For the days we did not have any cars you mean?
Q. For instance, on the first you ordered cars for the second; now if the cars did not come, now you figured up the price of the coal at that time, where did you get that figure for the price of the coal on the second?
A. I took the price on the first and the third, if we worked on the third I took those two and divided the two and then averaged the price.
Q. You averaged the price?
A. Yes, sir.
Q. That was the way you got at the price of the coal?
A. Yes, sir.
Q. That you say produced more than the running expenses?
A. Yes, sir.
Q. All expenses included?
A. All expenses, yes, sir, engineer, mine manager, and everything that was paid out.

181 Cross-examination by Judge KRAMER:

Q. You say that the coal had been prepared the day before; now what do you mean by having been prepared?

A. Well, I mean by that that sometimes it was loaded in boxes and brought to the bottom, part of it, and the other part would be lying back in the room ready to be loaded up.

Q. Was that about enough to load a car or a car and a half, that in the boxes already at the bottom of the shaft?

A. Yes, sir.

Q. And the rest of it would be just shot down in the room would it not?

A. Yes, sir.

Q. Now it would be necessary that that was in the boxes, to have the person of persons working at the bottom of the shaft to put that on the cage and hoist it, and then to have it dumped in the cars, would it not?

A. Yes, sir.

Q. And that portion now, that was still in the room, that would have to be loaded into the cars and then hauled from the room to the bottom of the shaft and hoisted and loaded into railroad cars would not it?

A. Yes, sir.

Q. And that is all a part of mining coal at a coal mine, is not it?

A. That is part of it, yes, sir.

Mr. WINKLEMANN: When you speak of the price was more than the cost of producing it, that was the case in every count, for the whole 99 days, was it?

A. Yes sir.

182 ALBERT J. AVERY, sworn for the plaintiff, testified as follows:

By Mr. WINKLEMANN:

Q. State your name.

A. Albert J. Avery.

Q. What is your business?

A. Coal business.

Q. Are you the agent for anybody?

A. The Avery Coal and Mining Company are the agent for the Mulberry Hill.

Q. Agent for what?

A. For the selling of Mulberry Hill Coal.

Q. You sell it?

A. Yes, sir.

Q. On January 10th, 1907 was you such agent?

A. Yes, sir.

Q. Did you sell any coal for them on the 11th?

A. I could not tell you without referring to my records.

Q. Have you some documents that show that?

A. The record is there, I believe.

Q. What was the price of coal on January 10th, 1907?

A. Lump coal was $1.05.
Q. And on the 11th?
A. There was no change in the market on the 11th.
Q. Did you get any coal on the 11th from the Mulberry Hill Coal Company?
A. No, sir.
Q. You have been on the stand before as a witness in this case?

183 A. Yes, sir.
Q. You know about the dates that we referred to then?
A. Yes, sir.
Q. Those dates being the same now, could the coal have been sold for those dates?
A. Yes, sir.
Q. At the same prices you gave then?
A. Yes, sir.
Q. That same declaration was read to yau at that time wasn't it?
A. Yes, sir, we went through the whole business.
Q. Item by item the whole 99 days?
A. Yes, sir.
Q. You got no coal from them on those 99 days?
A. No, sir.
Q. And the prices there stated were about the same?
A. Yes, sir.
Q. Would those coal have been sold on those days, if they could have shipped them to you?
A. Almost every day.
Q. You know the 99 days we have in this declaration, we charge they did not furnish cars and the coal could have been sold do you know whether the coal could have been sold at that time?
A. Yes, sir.
Q. And for enough to pay the expenses and over it at a profit do you know that?
A. I do not know exactly what it cost them.

184 FRED NOLD, recalled for the plaintiff, testified as follows:

Mr. WINKLEMANN:

Q. Nold I want to ask you a question—what was the price that it cost you to put the coal on the cars, what per cent per ton?
A. It cost us 66 cents to put it on the cars.
Q. That was your expenses?
A. Expenses; that was while our rating was 200 tons; when our rating was raised to 425 tons it cost us 65 cents and when our rating was 525 tons it costs us 64 cents.
Q. And that coal sold for $1.05 cents?
A. That was lump coal.

ALBERT J. AVERY, recalled for the plaintiff, testified as follows:

By Mr. WINKLEMANN:

Q. Do you know what the expense was of producing the coal?
A. Only from general knowledge.
Q. Now if the cost to the mine was 66 cents per ton to put it on the cars, now I want to know when you sell it at $1.05 if there was a margin there to cover that?
A. 66 cents, that is mine run I presume.
Q. For the whole output; could it have been sold for that amount at any time during that year?
A. Yes, sir.
Q. That is what you say?
A. Yes, sir.

185 Cross-examination by Judge KRAMER:

Q. Now Mr. Avery you were the sole agent for the selling of this coal during the year 1907?
A. Yes, sir.
Q. Where were you stationed?
A. At St. Louis.
Q. Have you records for the sales for that time?
A. For the entire year.
Q. Yes?
A. I have the invoices of the sales; it does not show the consignees, just the price and the tonnage.
Q. Will you tell me where your market was for selling this coal; where did you sell it during the year 1907?
A. Pretty much of it went to our own yards for sale.
Q. Where were your own yards located?
A. On 16th street in St. Louis.
Q. In the city of St. Louis, State of Missouri?
A. Yes, sir.
Q. What portion of it would you say during that year went to your yards?
A. I could not say.
Q. About?
A. I suppose may be fifty cars in the year.
Q. What proportion would that be of the entire output that went to your yards?
A. I think about one-fifteenth.
186 Q. Fifteen per cent?
A. No, about one-fifteenth, about six per cent.
Q. About six per cent?
A. Yes, sir.
Q. Where did the rest of it go?
A. We sold a great deal to the Polar Wave Ice and Fuel Company.
Q. Where are they located?
A. In St. Louis, their yards are in St. Louis.
Q. Did you deliver it at their yards in St. Louis?
A. We billed it through to the yards, yes, sir.

Q. And their yards are in the city of St. Louis, Missouri?
A. Yes, sir.
Q. Where else did you sell coal?
A. We sold a great deal of coal to the Bickett Coal Company.
Q. Where are they located?
A. They are buyers in the city of St. Louis.
Q. Where did you bill the coal you sold to them?
A. East St. Louis for reconsignment.
Q. Was it reconsigned?

Objected to by counsel for plaintiff as immaterial.
Objection overruled by the court.
To which ruling of the court the plaintiff by its counsel then and there excepted.

Q. Where did they reconsign it, to the Bickett Coal Company in St. Louis do you say?
A. We consigned it to the Bickett Coal Company East St. Louis and they sold it and consigned it on their several orders.
187 They consigned it on their several orders, we did not always get the final destination of every car of coal we sold them.
Q. You did not know where?
A. No, sir.
Q. What other customers, give some other customers you had.
A. Some of it went to the Illinois Railroad Company for company fuel.
Q. Where?
A. That I do not know; it was billed out by them, I do not know where it went.
Q. That was billed out from Freeburg?
A. Yes, sir, it was billed out from Freeburg.
Q. Can you give anybody else?
A. We sold some to the Madison Coal corporation, that was river business and we billed it to the Wiggins dump.
Q. Did you have any other customers now?
A. The Bessemer Wash Coal Company.
Q. Where were they?
A. Well some of it, the screenings went to their washer plant.
Q. Did you sell screenings to them?
A. Well, we sold them some lump coal too.
Q. What proportion of this coal did you sell in the City of St. Louis and State of Missouri, during the year 1907, I mean of the output of this mine, what proportion did you sell?
A. Do you mean that the final destination was the city of St. Louis?
188 Q. Yes.
A. Well, I should say about sixty per cent of it would be finally billed to St. Louis.
Q. Did you sell to any other points in the State of Missouri beyond the city of St. Louis, or points beyond St. Louis?
A. My recollection is that in the latter part of October and November we sold considerable going down to points in Texas.

Q. What proportion of the coal of the output of this mine during the year 1907 would you say was destined to points not within the State of Illinois?

A. Do you mean that the final destination was the State of Illinois?

Q. Well, that the final destination was the State of Illinois.

A. I hardly think that five per cent of it would be.

Q. You think that 95 per cent of it went outside of the State of Illinois?

A. Outside of the State of Illinois, yes, sir.

Q. Now this coal was handled practically all of it in the same car; there was no transfer of cars was there?

A. Only in case of bad order cars.

Q. Otherwise it went in the car in which it was loaded in the mine to its final destination did it?

A. Yes, sir.

Q. Now you have said Mr. Avery that you could have sold the other coal on the 99 days if the cars had been furnished
189 them, and if the coal had been ready for selling it that you could have sold it?

A. I think there was only about half dozen days that I would not say at the present time but what the coal could have been sold.

Q. The coal could have been sold you think?

A. Yes, sir.

Q. And where would you have sold it?

A. Largely to the same parties and other parties that were inquiring for coal from us.

Q. The destination of that coal, if the cars had been furnished would have been practically the same as the coal that actually was received?

A. Practically, yes, sir.

Q. You think that 95 per cent of that coal, if the cars had been furnished would have been sold outside of the State of Illinois?

A. Yes, sir.

Re-examination by Mr. WINKLEMANN:

Q. Mr. Avery, the railroad company bills them don't they?

A. Do you mean the way bills?

Q. The way bills.

A. The way bills are made out by the agents, yes, sir.

Q. They make them out and bill them to the destination where they are to go, the railroad company does that?

A. Well, the way bills give the destination, yes, the rail-
190 road company attends to all that.

Q. Who makes out the way bills now?

A. The railroad company; we give the billing to the agent or the mine people give the billing to the agent when there is a particular kind of billing.

Q. State that more distinctly, I do not get that exactly?

A. The billing is given to the agent by the mine.

Q. What agent?

A. The railroad agent, on their own stationery, and the agent it turn makes out what they call a way bill and I believe they are given to the train crews when they take out the cars.

Q. And then when they get to East St. Louis with them and the coal is to go further who transfers them there?

A. The coal is billed generally to the final destination, and I suppose the original way bill goes with it.

Q. Don't the Illinois Central transfer them to another company?

A. They transfer them to the connecting lines.

Q. Themselves?

A. Yes, sir.

Q. Did you ever know of any objections by the company to doing that kind of business?

A. No, sir.

Q. That was the way it was always done?

A. Yes, sir.

Q. I will ask you this question; when coal is billed to you
191 at Freeburg, do you do anything further, do you have to transfer it further?

A. No, sir.

Q. The railroad company does that?

A. The railroad company attends to all of that.

Q. That has been their practice of doing business?

A. Well, years ago before the installation of telephones at the mines all of the coal was billed to our ownselves at East St. Louis and we recognized it on our orders at East St. Louis.

Q. It would be billed to you do you say at East St. Louis?

A. For instance if we had five cars they would bill them to the Avery Coal Company at East St. Louis.

Q. That would be their billing from Freeburg?

A. Yes, sir, and we would have to give the billing on the same day.

Q. When did they change that rule, the railroad company?

A. I think that has been about ten years ago; we have no trouble about that now. Formerly the agent at Freeburg would bill the coal to the Avery Coal Company at East St. Louis, because we would have no way of getting the billing to the mine except by mail, and it would not *not* get there till the following day.

Q. That was the way they were doing business?

A. Yes, sir.

192 Q. That has been changed now and you bill it clear through?

A. There were generally consigning charges or demurrage charges and for that reason we had to give out billing as much as possible through to destination.

Q. Who paid the freight on the coal?

A. We were compelled to pay it, whoever got the coal.

Q. Do you pay that to the Central?

A. To the Illinois Central Railroad Company; we always paid that ourselves when the coal arrived in East St. Louis.

Cross-examination by Judge KRAMER:

Q. Mr. Avery, this billing that you talk about to East St. Louis that was the customary system that existed some years ago?
A. I think when I first broke into the business.
Q. Since then they have had a rule to bill it through to destination?
A. Not every car.
Q. Generally speaking?
A. Generally speaking, yes, sir.

193 FRED NOLD, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. WINKLEMANN:

Q. State your name.
A. Fred Nold.
Q. What is your business?
A. I am mine Manager—superintendent of the Mulberry Mill Mine.
Q. How long?
A. Ever since the mine was sunk.
A. I will ask you in regard to—you was on the witness stand before in the case?
A. Yes.
Q. You know how many days the mine laid idle on account of no cars?
A. The year of 1907.
Q. Yes?
A. 99 days.
Q. What was your loss at that time?

Judge KRAMER: We object to that.
The COURT: Sustained.
To which ruling of the court plaintiff by counsel then and there excepted.

Q. State if you lost anything.

Judge KRAMER: That is objected to.
The COURT: Sustained.
To which ruling of the court plaintiff by counsel then and there excepted.

194 Q. Well in regard to the use of the property, give a description of the property now, how large or how small?
A. You want all items mentioned?
Q. I want you to give a description of the mine there, how large it is or how small it is—how much is invested?

Judge KRAMER: I object to that; it is immaterial in this case whether he has a large mine or a small mine.
The COURT: I think it is proper to permit the witness to describe the mine, but not state how much he has invested.

Q. Well, describe the mine.

A. We had a large equipped mine—we have a shaft, it is 7½ feet by 14 feet square; we have a large air shaft; we have a double engine; large boiler.

Judge KRAMER: Are you telling what you have now or what you had in 1907?

A. What we had then.

Q. Confine it to 1909?

A. Well, three tracks there; shaker screen; the mine is able to produce all the way from two thousand to three or four thousand tons a day.

Judge KRAMER: We object to that—that evidently didn't apply to 1907——

The COURT: Sustained to the latter part of the answer.

To which ruling of the court plaintiff by counsel then and there excepted.

195 Q. Confine it to 1907, that is the year you were talking about.

A. Well we had from fifty to sixty boxes then and mules and anything that was needed to get the coal out.

Q. State, in the 99 days you say there was no cars, whether if there had been cars there, whether you could have sold them—whether they could have been sold to——

Judge KRAMER: Object to that.

The COURT: Sustained.

To which ruling of the court, plaintiff by counsel then and there excepted.

Q. What was the use of the mine per day if laying idle?

Judge KRAMER: We object to that question.

The COURT: Sustained.

To which ruling of the court, plaintiff by counsel then and there excepted.

Q. During that time that there was no cars furnished, during 1907, was the business to be done digging coal and selling it at the time?

A. Yes.

Q. The mine was idle for how many days?

A. 99 days.

Q. What was the cause of its idleness?

A. On account of not being furnished with cars to load.

Q. What was the value for the use of that mine per day, if no cars, how much could you have made?

Judge KRAMER: I object to that—not proper element of damages in this case.

196 The COURT: The latter part of that question "how much could you have made" that is improper I think—Sustained as to the latter part of the question.

Q. Answer the first part of the question—how much could you have made with regard to paying for the use of the mine and other expenses?

Judge KRAMER: We object to that.

The COURT: Sustained to the form of the question.

To which ruling of the court, plaintiff by counsel then and there excepted.

Q. State what was the value for the use of the mine during the days there was no cars?

Judge KRAMER: I object to that—not proper element of damages in this case.

The COURT: Overruled.

To which ruling of the court, defendant by counsel then and there excepted.

Q. Can you tell us what the use of the value was?
A. Rental use?
Q. Yes.
A. Well that would have been fifteen dollars a day, anyway.
Q. That would be then fifteen dollars for ninety-nine days?
A. Yes, sir.

197 Cross-examination by Judge KRAMER:

Q. You say the rental value of that mine for each day it stood idle was Fifteen dollars?
A. Yes, sir.
Q. What do you mean by saying its rental value was worth Fifteen Dollars per day?
A. By that I mean we have Thirty thousand dollars invested there and we figure the Thirty thousand dollars at five per cent, which would be very high interest on it, would average Fifteen dollars a day.
Q. You get at the rental value of that mine by figuring five per cent on the capital invested?
A. Yes, sir.
Q. And that is the only basis you have getting at its rental value isn't it?
A. Not exactly.
Q. Well, that is the basis you do use to testify it is worth Fifteen Dollars?
A. That would be the proper basis I think to figure the rental value.
Q. Was there any one around that would rent*ed* the mine for a day at a time and pay Fifteen dollars?
A. Was no one to rent it.
Q. Nobody would rent it, just rent it a day at a time?
A. They could easily afford to rent it at that a year or two.
Q. I mean they wouldn't rent it a day or two at a time would they?

198 A. I think they would.

Q. Do you think there is anybody, name a person that you think, during the year of 1907 that would come down there and rented that coal mine or any other coal mine just for a day?

A. I know very well, I have been in the coal business for a good while, and the way the market is at times, and the way it was at that time they would.

Q. You think anybody would have given Fifteen dollars for that mine for one day?

A. Yes, sir.

Q. What would they do with it?

A. For instance we are operating that mine, had everything ready to hoist coal, and if I would come along and if I wasn't interested in the company or not an employé, and the company would say, we have a mine, machinery, mules and everything else ready for hoisting coal you can have this mine for Fifteen dollars tomorrow, I would say Yes, I will take it.

Q. Suppose you didn't have all those things ready, the operator that was renting the mine had to look after everything, and those things were not furnished, would any man rent a mine for a day at a time?

A. If we didn't have those things ready to hoist it would not be worth it.

199 Q. I say you just furnish the mine itself, would it have any rental value?

A. I think it would.

Q. Everything would have to be ready and you would just have to turn over your operations of the mine to a man for a day to get any rent out of it?

A. Sir?

Q. I say for you to get any rental value out of a mine, for a day at a time, you would have to have everything ready and simply say to a man, I will let you have the use of this mine today for Fifteen dollars——

A. That would depend on the fellow.

Q. Did you ever hear, in all your experience, of any man ever renting a mine for a day at a time?

A. No, not for a day at a time.

Q. In fixing Fifteen dollars it is not based upon any transaction of that kind that you ever heard of is it?

A. What?

Q. I say in fixing the rental of that mine at Fifteen dollars you haven't fixed that, basing it upon any transactions of such rental contracts that you have ever known in your life?

A. I don't think there is much difference whether you pay Fifteen dollars a day or whether you pay so much a ton.

Q. I say you never have known of any mine to be rented that way in your life have you?

A. Well, I haven't heard of any.

Q. In fixing this Fifteen dollars a day rental value, you

200 say you have made that from the capital invested?

A. Yes, sir.

Q. Five per cent?
A. About.
Q. Upon the capital invested?
A. Yes.

Judge KRAMER: I move, your honor, to exclude that evidence upon the grounds it is based upon a theory that can't be used in arriving at measure of damages in this kind of a case.

By Mr. WINKLEMANN:

Q. Could that mine have been rented for Fifteen dollars a day?
A. Yes, sir, easily.

Judge KRAMER: I object to that.

Q. During the year 1907?

Judge KRAMER: I object to that because the mine has never been put in condition and never has been so it could have been rented during the year 1907.

The COURT: Overruled.

To which ruling *of* the defendant by counsel then and there excepted.

Q. State whether it could have been rented?
A. Yes, sir, could have been rented at Fifteen dollars.
201 Q. During that year, 1907?
A. Yes, sir.
Q. Those 99 days when there was no cars there?
A. Yes, sir.

The COURT: Now the motion to exclude will be denied.

To which ruling of the Court, defendant by counsel then and there excepted.

Plaintiff rests.

And thereupon counsel for defendant presented to the court the following motion, to-wit:

STATE OF ILLINOIS,
County of St. Clair, ss:

In the Circuit Court to the April Term, A. D. 1912.

MULBERRY HILL COAL COMPANY
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

Case.

And now after the close of all the evidence offered on behalf of the plaintiff in the above entitled cause, comes the defendant, by Kramer, Kramer & Campbell, its Attorneys and moves the
202 court to exclude from the jury all the evidence offered in the above entitled cause, and to instruct the jury to return a

verdict in favor of the defendant herein, and presents herewith a written instruction in that behalf.

KRAMER, KRAMER & CAMPBELL,
Attorneys for Defendant.

The Court instructs the jury to find for the defendant in this cause, and to return the following verdict:

"We, the jury, find the defendant not guilty."

(Refused.)

But the court denied the said motion and refused to give the said instruction to the jury.

To which action and decision of the court in denying the said motion and refusing to give the said instruction to the jury, the defendant, by its counsel, then and there excepted.

And thereupon the defendant to sustain the issues upon its part, introduced the following evidence, to-wit:

203 S. W. SOUBRY, a witness called on behalf of the defendant being first duly sworn, testified as follows:

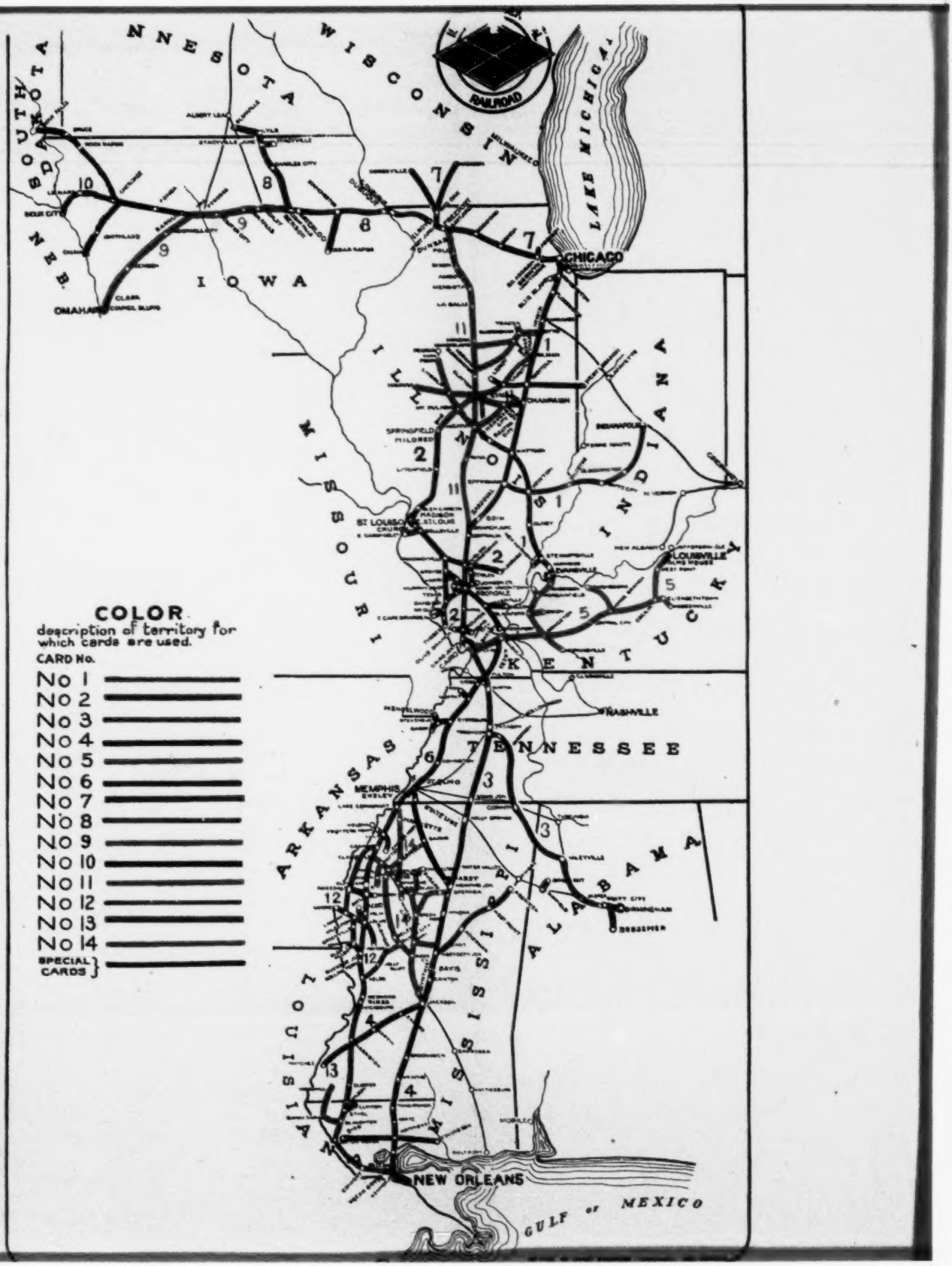
Direct examination by Judge KRAMER:

Q. State your name.
A. S. W. Soubry.
Q. Where were you living during the year 1907?
A. Chicago, Illinois.
Q. What was your business during that year?
A. Chief Clerk to the General Superintendent of Transportation of the Illinois Central Railroad Company.
Q. Who was the General Superintendent?
A. O. S. Keith.
Q. What were your duties as Chief Clerk of the Supt. of Transportation during that year, for the Illinois Central Railroad Company?
A. I had charge of distribution of freight car equipment between sixteen divisions of the Illinois Central Railroad Company.
Q. Did you have charge of the distribution of coal hauling equipment for the Illinois Central Railroad Company among the various divisions during that year?
A. Yes, sir, coal car equipment as well as other equipments.
Q. Are you familiar with the lines of the Illinois Central Railroad Company?
A. Yes, sir.
Q. I wish you would examine this plat and tell us whether or not that is a correct map of the lines of the Railroad of the
204 Illinois Central Railroad Company as they existed in the year 1907?
A. Yes, sir, that is a reproduced map of the Illinois Central showing the states they run through.
Q. Can you tell me in what states the lines of the Illinois Central R. R. run, you may state what states it runs in?

A. Runs in thirteen states.
Q. Can you name them?
A. Yes, sir.
Q. All right.
A. Wisconsin, Illinois, Iowa, Nebraska, Minnesota, South Dakota, Indiana, Kentucky, Tennessee, Mississippi, Louisiana, Alabama and Arkansas.
Q. I will ask you to examine this part—are you familiar with the location of coal mines on the lines of the Illinois Central Railroad Company?
A. Yes, sir, I am.
Q. Where are they located?
A. In Illinois, Indiana and Kentucky—on these different divisions.
Q. Does this plat show the location of the coal mines?
A. Yes, sir, the mines are on the divisions in different colors.
Q. What are the divisions, the names of the divisions as they existed in the year 1907?
A. Freeport division, Chicago Division, St. Louis Division, Tennessee Division, Indiana Division and Peoria Division.
Q. Can you give the colors in which these various divisions appear on this plat?
205 A. The yellow is St. Louis Division, Springfield in light green, Peoria in dark purple, Chicago in white, Freeport in Orange, Louisville in red, Indianapolis, was called Indianapolis Southern in Brown.
Q. Does this plat also show the names of the operators located on the lines in these various divisions?
A. Shows the name of each mine.
Q. Yes, that is what I mean?

Judge KRAMER: I now offer these two plats in evidence. The first one is marked Defendant's Ex. A. and Defendant's Ex. B.
Here insert Exhibits "A" and "B."

(Here follow maps marked pp. 206 & 207.)


SOUTH DAKOTA
NNESOTA
WISCONSIN
LAKE MICHIGAN
RAILROAD
CHICAGO
NEB.
IOWA
OMAHA
ILLINOIS
INDIANA
MISSOURI
ST. LOUIS
LOUISVILLE
KENTUCKY
NASHVILLE
TENNESSEE
ARKANSAS
MEMPHIS
MISSISSIPPI
ALABAMA
LOUISIANA
NEW ORLEANS
GULF OF MEXICO
COLOR
description of territory for which cards are used.
CARD No.
No 1
No 2
No 3
No 4
No 5
No 6
No 7
No 8
No 9
No 10
No 11
No 12
No 13
No 14
SPECIAL CARDS

CHART

TOO

LARGE

FOR

FILMING

208 Q. Do you know, Mr. Soubry the manner in which the Illinois Central distributed its coal cars among the various divisions, that you have just testified about, along its lines?

A. Yes, sir.

Mr. WINKLEMANN: That is objected to unless brought down to the proper time.

Q. During the year 1907?

The COURT: You may answer now.

A. Yes, sir.

Q. I will hand you these rules now I wish Mr. Soubry you would explain to the jury the manner in which, in a brief way, the manner in which the company distributed the equipment among the various divisions, during the year 1907?

A. Each division was given a rated capacity, based upon what tonnage they were able to produce—each division was rated or all mines upon each division, so they would have the same percentage——

Q. Was that method employed during the entire year 1907?

A. Yes, sir.

Q. I will ask you to state to the jury whether or not the same method was employed as to all coal mines located on the lines of the Illinois Central Railroad?

A. Yes, sir.

Q. Did the railroad company during the latter part of the year 1906 promulgate any rules with reference to distribution of coal cars?

209 A. Yes, sir.

Q. Were those rules in operation during any part of 1907?

A. The Illinois Central Railroad Company promulgated a set of rules in August, 1906, after meetings with various coal operators, the rules were to take effect on September, 1906, and continued in effect until the 1st of August, 1907.

Q. Have you the copy of those rules?

A. I have both of them.

Q. Let me have the ones that were first——

A. That is the rule that went in effect September, 1906.

Mr. MILLER: I object to that—doesn't show this mine was ever party to that.

The COURT: What is the object?

Judge KRAMER: This is to show the equitable method they had for distributing coal car equipment among the coal operators.

The COURT: If properly followed up I will let it go in.

Judge KRAMER: I will promise to bring it down to the division of this mine.

To which ruling of the court plaintiff by counsel then and there excepted.

Judge KRAMER: I now offer this in evidence Exhibit "C."

210 EXHIBIT "C."

Illinois Central Railroad Company.

Office of Superintendent of Transportation.

CHICAGO, *August 22nd*, 1906.

Revised Rules Governing the Distribution of Cars at Coal Mines, Effective September 1st, 1906.

1. Cars furnished for the loading of Illinois Central Railroad Company's coal will not be counted.
2. Cars furnished by foreign railroads to be loaded with their fuel coal will not be counted.
3. Cars owned by coal mine operators when placed at their own mines will not be counted.
4. Cars received from foreign roads in switching service to be placed at a mine upon the tracks of the Illinois Central Railroad Company will not be counted.
5. All other cars, regardless of the class or initial, will be counted in the distribution and will be distributed to all the mines upon the Illinois Central Railroad according to the rating of the mine.
6. A mine located upon the Illinois Central Railroad and one or more foreign roads will be given the same rating as though it were located upon the Illinois Central Railroad only.
7. A mine located upon the Illinois Central Railroad and also having a river outlet, will be given the same rating as though it were located upon the Illinois Central Railroad only.
8. Cars will not be furnished mines located on the tracks of other Railroad Companies not reached by the Illinois Central without instructions from the Superintendent of Transportation of the Illinois Central Railroad.
9. If a mine is furnished its full rating, it will be counted a full supply, or 100% for that day, whether the cars are loaded or not provided the cars are placed in time to load.
10. If a mine is furnished less than a full supply, the fraction furnished will be counted, whether the cars are loaded or not, if the cars have been ordered and are placed in time to load and provided the minimum tonnage of cars is supplied.
11. Mine operators will inform the Railroad Company the minimum tonnage necessary for them to have to operate the mine.
12. Should the Railroad Company fail on any day to place sufficient cars at a mine in time for loading, such cars will not be counted against a mine and the tonnage the mine lost as a result of the Railroad Company's failure, will be made good on the succeeding day or as soon thereafter as is practicable.
13. Cars left over at mines are counted again the following day and each day until loaded, except that when a mine has empties that are not wanted, they will not be counted commencing with the day

following the date the Railroad Company is given notice by the mine the cars are not wanted.

14. Loads remaining on hand unbilled will be counted as emptied each day until shipping directions have been furnished.

211 15. If a mine loads cars against an embargo billing will not be accepted and such cars will be counted against a mine the same as empties each day until the embargo is raised or other shipping directions furnished.

16. If a mine loads more than its rating, the fractional part in excess of its rating will be counted.

17. When a mine resumes work after being closed down for any cause, it will be furnished cars commencing with the day work was resumed on the same percentage basis as other mines in the same territory.

18. Mines should order from the Railroad Company each day by 12:00 o'clock, noon, the cars required for the following day's loading.

19. To change a rating, the coal mine operator should take the question up with the Superintendent of the Division of the Railroad upon which his mine is located, and the matter will receive prompt attention.

20. When the established rating of a mine is increased, all coal operators on the division will be notified of the change.

21. The minimum rating of any mine will be 100 tons. This includes mines under development.

22. A record will be kept in the office of the Superintendent of the Railroad Company, showing the rating of each mine, the cars furnished and percentages furnished each mine and these records will be open for the inspection of all coal operators.

23. A record will be kept in the office of the Superintendent of Transportation at Chicago, showing the percentages furnished each division and this record will be open for inspection.

(Signed) O. S. KEITH,
Superintendent of Transportation.

(Written with pencil:) Min. increased to 200 tons per day, June 1st, 1907.

212 Q. Now were any further rules or any modification of those adopted later.

A. They were modified and some additional rules made in August, 1907, after further meeting with coal operators.

Q. Are those the ones that were promulgated then?

A. Yes, sir, and continued the balance of 1907, that set of rules superseded the previous ones.

Judge KRAMER: I will introduce those as rules promulgated by the Illinois Central Railroad Company.

Mr. MILLER: Same objection to this one as to the other.

The COURT: I will see what follows.

To which ruling of the court, plaintiff by counsel then and there excepted.

213 EXHIBIT "D."

Illinois Central Railroad Company.

Office of the Superintendent of Transportation.

Circular No. 69.

CHICAGO, *July* 20, 1907.

Rules Governing the Distribution of Cars at Coal Mines.

Effective August 1st, 1907, the following rules will govern the distribution of cars to coal mines located on the Illinois Central Railroad, and will supersede rules contained in Circular issued by the undersigned dated August 22, 1906, which became effective September 1, 1906:

1. The established rating of a mine shall be the capacity fixed upon as a basis for distribution.

2. The minimum established rating of any mine will be 200 tons. This includes mines under development.

3. To obtain an increased rating the coal mine operator will apply to the Superintendent of the division upon which his mine is located.

4. To establish a reduced rating of any coal mine, the Superintendent of the division upon which such mine is located will take the initiative.

5. When the property of any established rating is challenged by either party the coal operator affected, or the railroad company, an investigation shall be made by the railroad company for a period of not less than one-half calendar month, to ascertain the amount of coal loaded upon railroad cars, and the actual number of hours during which the mine was in operation, and shall take into account all conditions which in the judgment of the railroad would affect the fairness of the established rating.

6. When the established rating of any mine is changed, all coal operators on the division shall be notified of the change.

7. A mine located on the Illinois Central Railroad and one or more foreign roads, shall be given the same rating as though it were located on the Illinois Central Railroad only.

8. A mine located upon the Illinois Central Railroad and having also a river outlet, shall be given the same rating as though it were located on the Illinois Central Railroad only.

9. A coal company having two or more mines in the same switching distance, may direct at what mine or mines the cars shall be placed, except that where any one mine has been shut down for more than thirty days, the rating for that mine shall be deducted from the rating of the total number of mines, until operation is resumed at that particular mine.

10. Less than the established rating of a mine may be ordered,

but when this is done, the number of tons ordered shall be the rating or 100 per cent of that day.

11. Cars loaded with Illinois Central Railroad Company's coal shall be counted.

12. Cars furnished by foreign roads to be loaded with fuel coal shall not be counted.

13. Cars owned by coal mine operators when placed at their own mines shall not be counted.

214 14. All other cars (of all classes or ownership) shall be counted in the distribution and the distribution of them shall be made according to the established rating or capacity of each mine in tons.

15. To equalize differences between large and small mines as to partially loaded cars left over at night, eighty (80) tons shall be deducted arbitrarily from the number of cars not billed out. After such deduction, all other cars left over at the mine shall be counted for that day and again the following day, and each successive day until loaded, except that when a mine has empties which are not required, they shall be counted commencing with the day following the date the railroad company is given notice by the mine that such cars are not required.

16. If a mine is furnished less tonnage than its rating, the tonnage furnished shall be counted in accordance with these rules, whether the cars are loaded or not, if the cars have been ordered, and are properly placed in time to load and provided the minimum tonnage of cars is supplied.

17. If a mine loads more than its rating the fractional part in excess of its rating will be charged, but the rating of the mine for that day shall be increased to the extent of the total tonnage loaded.

18. Coal operators are requested to inform the railroad company of the minimum tonnage necessary to have to operate their mine or mines.

19. When the railroad company fails to place sufficient cars at a mine on any day in time for loading such cars shall not be counted against the mine, and the tonnage the mine lost as a result of the railroad company's failure shall be made good on the succeeding day, or as soon thereafter as is practicable.

20. Loads remaining on hand unbilled shall be counted as empties each day until shipping directions have been furnished.

21. If a mine loads cars against an embargo, billing will not be accepted and such cars shall be counted against the mine the same as empties each day until the embargo is raised or other shipping directions furnished.

22. When a mine resumes work after having been closed down for any cause, it shall be furnished cars commencing with the day work is resumed on the same percentage basis as other mines in the same territory.

23. A record will be kept in the office of the Superintendent of the railroad company showing the established rating of each mine, the tonnage furnished and the percentage of each mine on his division. These records shall be kept open for the inspection of all interested operators.

24. A record shall be kept in the office of the Superintendent of Transportation at Chicago, showing the percentage for each division and the railroad as a whole, and this record shall be open for the inspection of all coal operatives on the System.

(Signed) O. S. KEITH,
Superintendent of Transportation.

215 Q. Do you know whether or not during the year of 1907 the Illinois Central Railroad Company had sufficient amount of cars to furnish coal operators all the cars they were wanting or demanding that year?

A. No, sir they did not.

Q. What did they do when they did not have sufficient number to supply all cars that were demanded and wanted by the operators?

A. It undertook to distribute them equally between all operators based on the rating capacity of their mine.

Q. What would have been the consequences if the Illinois Central Railroad Company at the time when it did not have sufficient number of cars to supply all the operators with all cars they were wanting and demanding and they would supply one or more mines with all of them and not any to others?

Mr. WINKLEMANN: I object.

The COURT: I will let him answer.

To which ruling of the court, plaintiff by counsel then and there excepted.

A. It would mean taking them away from some other operator.

Q. Do you know how the overhauling equipment was distributed on the various divisions?

A. I know in a general way only.

Q. I want you to tell how it was done in a general way whether the company had any one in charge at the various divisions?

216 A. Each division handled it in their Superintendent's office, some divisions had car distributor, other divisions handled it by the chief train dispatcher.

Q. You know whether or not was a car distributor in St. Louis division in 1907?

A. Yes, sir.

Q. You know who he was?

A. Yes, sir.

Q. Who?

A. Mr. Whiteside.

Q. Did they have anyone else to look after the distribution of these cars during the year 1907?

A. On the divisions.

Q. No, the company itself outside of your office and various divisions?

A. No, sir.

Q. Your office distributed them among the divisions and then the various divisions among the operators?

A. Yes, sir.

Cross-examination by Mr. MILLER:

Q. What is your name.
A. Soubry.
Q. You stated that your roads run in these various states that you have named here?
A. Yes, sir.
Q. Did you ship any coal from St. Clair County to those
217 various states on your road?
A. It goes to some of these states but not all.
Q. Did you ship any to Missouri on your cars?
A. We don't run to Missouri.
Q. Don't you run across the bridge?
A. No, sir, we use the Terminal Railroad, the Illinois Central R. R. proper don't go into St. Louis.
Q. Don't your cars run into St. Louis?
A. Our cars they go in all states in the union.
Q. Did you ship any coal to these various states that you have named on your cars?
A. Yes, sir.
Q. Any objections made to that by you?
A. None whatever.
Q. How is that done, explain to the jury, suppose a car is loaded here or cars loaded in St. Clair County would be billed to an outside state, out of Illinois, in what manner is that done by your company?
A. A car loaded in St. Clair County for Missouri and bill given at point loaded, the original car would go thru to the final destination, unless a break down.
Q. Then you do ship from St. Clair to other states in your own cars?
A. Yes, sir.
Q. Ever any objection made by the company to that?
A. That has — the practice for years, and there has been some trouble getting our equipment returned to——
218 Q. Some trouble between you and where you transferred it?
A. Other railroads didn't return them.
Q. No trouble between the shipper and consignee?
A. No.
Q. You was talking about meeting of the operators, was this Mulberry Hill Coal Company in this meeting?
A. I couldn't say.
Q. Was you at the meeting?
A. No, sir.
Q. Do you know whether any operator was there?
A. I don't know whether you was represented there or not.
Q. You simply said that because you heard it?
A. I knew the meeting was held.
Q. Was you there?
A. No.

Q. Tell us the manner of distribution of your cars, you say you would distribute them how?

A. Equitably between divisions, and the divisions distributed them between the mines, based on the mines' capacity.

Q. You know this Mulberry Coal Company was rated 200 tons first?

A. My impression the division office had those figures—it was 100 ton- to start with and was raised several times after.

Q. Will you tell the jury the propriety of raising it?

A. In 1906 any mine was given a minimum rating, for any mine was 100 ton-, if one were only getting 15 ton-, it was given a rating of 100.

219 Q. At this Mulberry Hill Coal Company was rated 200 ton- in 1907, at first 200 ton-, now it was increased from that to 424 wasn't it?

Judge KRAMER: I object to that.

The COURT: Sustained.

To which ruling of the Court, plaintiff by counsel then and there excepted.

Q. Wasn't the rating increased after, you know that don't you?

A. Yes, several times after.

Q. Will you tell the jury the propriety of increasing the rating when they increased, what does that mean, more or less cars. The purpose of increasing the rating, say the mine produced 200 ton- and raised from 200 to 425, now what is the propriety — raising that, what is the meaning of that raising?

A. It means the mine was demonstrated they can load 425 tons, consequently were given that rating.

Q. So that means to increase the number of cars they are entitled to?

A. Yes.

Q. Will you say they ever got any more cars than they got at the 200 ton rating, when you increased it?

A. I will.

Q. When you increase in your rating does that mean the proprietor is entitled to so many cars per day?

A. You are entitled to your proportion of available cars.

Q. Per day means every week day don't it—when you say per day you are entitled to 200?

220 A. Two hundred tons per day.

Q. That would mean how many cars at that rate?

A. Well don't go by cars, go by tonnage.

Q. What do you call that tonnage if you furnish the cars, can you tell me?

A. We have to have some basis to give you your proportion of cars available.

Q. What was his proportion, how many cars was he to have. Q. How many cars were they entitled to under that rating?

A. Your share of equipment.

Q. What was the share?

Judge KRAMER: I object to that.
The COURT: The distribution was made daily, this question would cover whole period of time—I don't think it would be a fair question.

Q. What was the propriety increasing the rating from 200 to 425 tone?

Judge KRAMER: I object.
The COURT: Sustained.
To which ruling of the court, plaintiff by counsel then and there excepted.

Q. Was the operator to be entitled to more or less cars?

Judge KRAMER: Object to that.
The COURT: Overruled.
To which ruling of the court defendant by counsel then and there excepted.

221 A. He would be entitled to more cars.
Q. Will you tell us what proportion this party was entitled to in 1907?

Judge KRAMER: That is objected to.
The COURT: Sustained.
To which ruling of the court plaintiff by counsel then and there excepted.

Q. You know whether this Mulberry Hill Coal Company got any cars on the 11th of January 1907?
A. I couldn't testify as to the definite dates.
Q. You know whether there was 99 days they didn't get any cars at all?
A. Not to my knowledge.
Q. Tell us a little more about your method of distributing the cars?

Judge KRAMER: I object to that unless he particularizes what he wants.
The COURT: Better direct the witness what you are asking for.

Q. You can't tell us how many cars Mulberry Hill Coal Company received during the year 1907?

Judge KRAMER: I object to that because this witness does not pretend to testify on that subject.

Q. You have nothing to do with local distribution?
A. Not between individual mines, the St. Louis mine distribution is handled by the division office.
222 Q. You have nothing to do with that distribution?
A. No.

Redirect examination by Judge KRAMER:

Q. I will ask you to state whether or not during the entire year 1907 when there was a shortage of cars, whether or not all the available equipment for hauling coal, the Illinois Central Railroad

Company had was distributed among the various divisions daily for the distribution of coal?

A. Yes, sir.

Recross-examination by Mr. WINKLEMANN:

Q. You are still in the employ of the Illinois Central Railroad Company?

A. Yes, sir.

223 JOHN C. MOUS, a witness called on behalf of the defendant being first duly sworn, testified as follows:

Direct examination by Judge KRAMER:

Q. State your name?

A. John C. Mous.

Q. Where do you live?

A. Chicago, Illinois.

Q. What is your business?

A. Now?

Q. Yes.

A. Chief Clerk to the Gen'l Superintendent of Transportation.

Q. What was your business in 1907?

A. Traveling car agent for the Illinois Central.

Q. I wish you would explain what that is?

A. Look after delayed cars and prompt movement of loads and empties.

Q. Did you have anything to do with reference to distribution of coal cars?

A. Nothing to do with distribution of them.

Q. Did you have anything to do with the movement of the cars to see if they were properly moved?

A. Yes, sir.

Q. Do you know whether or not during the year 1907 there was a shortage of coal cars on the part of the Illinois Central Railroad Company, that is whether or not they had sufficient amount of coal cars to furnish all operators located on its lines with
224 all cars they demanded or *or* desired to load with coal at the various coal mines?

Mr. WINKLEMANN: I object to that.

The COURT: You may answer whether or not there was a shortage.

To which ruling of the court plaintiff by counsel then and there excepted.

A. Yes, sir.

Q. You say you know there was a shortage?

A. Yes, sir.

Q. Did you know the method that the railroad company used for distributing cars among the various divisions located on its lines?

A. Yes, sir.

Q. How did they get at the cars that each division was entitled to?
A. The general office would receive a report from each division showing the cars supplied and percentage of the mines and distribution was made from such report.
Q. You know whether or not during the year 1907 when there was a shortage of coal cars, the coal hauling equipment available of the Illinois Central Railroad Company was distributed among the various divisions?

Mr. WINKLEMANN: I object to that—that is calling for a conclusion.

225 Q. Let me state that again: Do you know whether or not during the year 1907, when there was a shortage of coal cars on the part of the Illinois Central Railroad Company that they did distribute all of the coal hauling equipment they had available among its various divisions?
A. Yes, sir.
Q. You prepared a statement of the amount of coal cars that the Illinois Central had during the year 1908 and during the year of 1909 up to and including the 31st day of August—I wish you would look thru that statement?
A. Yes, sir.
Q. What time does it go to?
A. First of October.
Q. 1909?
A. Yes, sir.
Q. Let me ask you a preliminary question: I will ask you to state in the operation of the Illinois Central Railroad Company, whether or not there are times that it has all of the coal hauling equipment that is demanded and required by the operators on each line for——
A. Yes, sir.

Mr. MILLER: I object to that, it is leading and suggestive.
The COURT: Overruled.
To which ruling of the court plaintiff by counsel then and there excepted.

226 Q. I will ask you whether or not there are other times when it does not have sufficient number to meet all of their demands?

Mr. MILLER: I object to that question.
The COURT: Overruled.
To which ruling of the court, plaintiff by counsel then and there excepted.

Q. Does your report show the surplus coal cars that the company had on hand daily during the year 1908 and 1909 up to October 1st, 1909.

Mr. WINKLEMANN: I object to that.
The COURT: It is very leading.
To which ruling of the court, defendant by counsel then and there excepted.

Q. You tell me what it shows, what does this report show?
A. The report I looked at?
Q. Yes.
A. Shows the surplus coal cars of the Illinois Central from January 1st 1908 to September 30th 1909, inclusive.
Q. What do you mean by surplus coal cars?
A. More coal loading equipment than we have orders or demands for by shippers.
Q. I wish you would commence and read them down?

Mr. MILLER: If they are offered in evidence I object—has no bearing on any issue in this case.

The COURT: Overruled.

To which ruling of the court plaintiff by counsel then and there excepted.

227 *Statement of Surplus Coal Cars on Hand from January 1st, 1908, to October 1st, 1909.*

Date.	No. cars.
January 3rd, 1908	4,781
" 4th	5,059
" 6th	5,289
" 7th	4,289
" 8th	5,341
" 9th	5,261
" 10th	4,707
" 11th	4,606
" 13th	4,552
" 14th	4,540
" 15th	4,379
" 16th	4,071
" 17th	4,111
" 18th	4,154
" 20th	4,377
" 21st	4,543
" 22nd	4,598
" 23rd	4,562
" 24th	4,369
" 25th	4,567
" 27th	4,996
" 28th	4,985
" 29th	5,073
" 30th	5,022
" 31st	5,076
Total 25 days	117,308 average 4,692 per day.

228

February 2nd, 1908	4,819
" 3rd	5,004
" 4th	5,740

"	5th	4,851
"	6th	4,836
"	7th	5,132
"	8th	4,968
"	10th	5,026
"	11th	4,650
"	12th	5,018
"	13th	5,082
"	14th	5,119
"	15th	5,129
"	17th	5,362
"	18th	5,313
"	19th	5,157
"	20th	5,277
"	21st	5,300
"	24th	5,396
"	25th	5,366
"	26th	5,132
"	27th	5,251
"	28th	5,045
"	29th	5,054

Total 24 days..... 122,027, average 5,087 per day.

229

March	2nd, 1908	4,668
"	3rd	4,492
"	4th	4,402
"	5th	4,098
"	6th	4,200
"	7th	4,235
"	9th	4,259
"	10th	4,249
"	11th	4,306
"	12th	4,237
"	13th	4,157
"	14th	4,120
"	16th	4,404
"	17th	4,053
"	18th	4,102
"	19th	4,202
"	20th	4,085
"	21st	4,104
"	23rd	4,172
"	24th	4,232
"	25th	4,188
"	26th	4,300
"	27th	4,257
"	28th	4,114
"	30th	4,355
"	31st	4,564

Total 26 days..... 110,555 average 4,252 cars per day.

230

April	1st, 1908	4,767
"	2nd	5,087
"	3rd	4,806
"	4th	5,458
"	6th	5,940
"	7th	6,535
"	8th	6,763
"	9th	6,888
"	10th	7,083
"	11th	7,365
"	13th	8,055
"	14th	8,232
"	15th	8,162
"	16th	8,600
"	17th	8,997
"	18th	9,039
"	20th	9,464
"	21st	9,717
"	22nd	9,831
"	23rd	9,914
"	24th	10,294
"	25th	10,506
"	27th	10,460
"	28th	10,453
"	29th	10,719
"	30th	10,530
	Total 26 days	213,665, average 8,218 cars per day.

231

May	1st, 1908	11,368
"	2nd	11,333
"	4th	11,460
"	5th	11,590
"	6th	11,384
"	7th	11,858
"	8th	11,224
"	9th	11,526
"	11th	11,170
"	12th	10,748
"	13th	9,936
"	14th	9,554
"	15th	8,849
"	16th	8,142
"	18th	7,744
"	19th	7,105
"	20th	6,761
"	21st	6,807
"	22nd	6,543
"	23rd	6,338

"	25th	6,445
"	26th	6,639
"	27th	6,469
"	29th	6,230
"	29th	5,916
	Total 25 days	223,139, average 8,926 cars per day.

232

June	1st 1908	5,969
"	2nd	6,098
"	3rd	6,013
"	4th	6,161
"	5th	6,398
"	6th	6,248
"	8th	6,592
"	9th	6,475
"	10th	6,815
"	11th	6,394
"	12th	6,441
"	13th	6,178
"	15th	6,755
"	16th	6,580
"	17th	6,108
"	18th	5,964
"	19th	6,187
"	20th	6,513
"	22nd	6,483
"	23rd	6,500
"	24th	6,355
"	25th	5,965
"	26th	5,782
"	27th	5,942
"	29th	5,942
"	30th	6,022
	Total 26 days	162,928, average 6,240 cars per day.

233

July	1st, 1908	5,898
"	2nd	6,108
"	3rd	5,993
"	6th	5,548
"	7th	6,297
"	8th	5,892
"	9th	5,894
"	10th	6,090
"	11th	6,803
"	13th	6,781
"	14th	6,658
"	15th	6,597
"	16th	6,627

"	17th	6,416
"	18th	6,450
"	20th	6,506
"	21st	6,400
"	22nd	6,258
"	23rd	6,370
"	24th	6,161
"	25th	6,007
"	27th	5,895
"	28th	5,729
"	29th	5,747
"	30th	5,740
"	31st	5,586
Total 26 days		161,451, average 6,210 cars per day.

234

August	1st, 1908	5,613
"	3rd	5,905
"	4th	5,872
"	5th	5,295
"	6th	4,816
"	7th	4,863
"	8th	4,769
"	10th	4,809
"	11th	5,313
"	12th	4,864
"	13th	4,975
"	14th	4,162
"	15th	4,208
"	17th	4,270
"	18th	4,021
"	19th	3,831
"	20th	3,461
"	21st	3,694
"	22nd	3,228
"	23rd	2,548
"	24th	3,799
"	25th	3,439
"	26th	3,145
"	27th	3,287
"	28th	3,128
"	29th	3,047
"	31st	3,261
Total 27 days		113,622, average 4,216 cars per day.

235

September	1st, 1908	3,089
"	2nd	3,097
"	3rd	3,015
"	4th	2,916

"	5th	2,990
"	8th	3,438
"	9th	3,292
"	10th	3,039
"	11th	3,022
"	12th	3,009
"	14th	3,151
"	15th	2,877
"	16th	2,864
"	17th	2,840
"	18th	2,813
"	19th	2,804
"	21st	2,876
"	22nd	2,923
"	23rd	2,948
"	24th	2,902
"	25th	2,869
"	26th	2,670
"	28th	2,812
"	29th	2,817
"	30th	2,965
Total 25 days.....		74,038, average 2,962 cars per day.

236

October	1st, 1908.....	2,809
"	2nd	2,664
"	3rd	2,589
"	5th	2,743
"	6th	2,743
"	7th	2,732
"	8th	2,727
"	9th	2,750
"	10th	2,618
"	11th	2,762
"	13th	2,742
"	15th	2,673
"	16th	2,703
"	17th	2,594
"	19th	2,750
"	20th	2,624
"	21st	2,560
"	22nd	2,472
"	23rd	2,434
"	24th	2,584
"	26th	2,539
"	27th	2,721
"	28th	2,724
"	29th	2,565
"	30th	2,585
"	31st	2,615
Total 26 days.....		69,025, average 2,655 cars per day.

237

November	2nd, 1908.....	2,649
"	3rd	2,837
"	4th	3,013
"	5th	3,017
"	6th	3,224
"	7th	3,343
"	9th	3,951
"	10th	3,341
"	11th	3,323
"	12th	2,685
"	13th	2,994
"	14th	2,964
"	16th	2,961
"	17th	2,883
"	18th	2,860
"	19th	2,906
"	20th	2,885
"	21st	3,261
"	23rd	3,429
"	24th	3,264
"	25th	3,255
"	27th	3,453
"	28th	3,430
Total 23 days.....		71,928, average 3,127 cars per day.

238

December	7th, 1908.....	3,786
"	14th	3,919
"	15th	4,142
"	16th	4,197
"	17th	4,075
"	18th	4,024
"	19th	4,111
"	21st	4,387
"	22nd	4,402
"	23rd	4,373
"	24th	4,089
"	26th	4,536
"	28th	5,703
"	29th	5,750
"	30th	5,564
Total 15 days.....		67,058, average 4,471 cars per day.

239

January	2nd, 1909.....	5,870
"	4th	6,459
"	5th	6,410
"	6th	5,944
"	7th	5,243

"	8th	5,047
"	9th	4,892
"	11th	5,359
"	12th	5,112
"	13th	5,028
"	14th	4,995
"	15th	5,031
"	16th	5,038
"	18th	5,300
"	19th	5,331
"	20th	5,180
"	21st	5,031
"	22nd	4,924
"	23rd	4,785
"	25th	5,304
"	26th	5,522
"	27th	5,508
"	28th	5,651
"	29th	5,529
"	30th	5,508
Total 25 days.....		134,001, average 5,360 cars per day.

240

February	1st, 1909.....	5,712
"	2nd	5,809
"	3rd	5,422
"	4th	5,263
"	5th	5,605
"	6th	5,781
"	8th	6,070
"	9th	5,694
"	10th	5,599
"	11th	5,702
"	12th	5,841
"	13th	5,592
"	15th	5,699
"	16th	5,748
"	17th	5,523
"	18th	5,289
"	19th	5,334
"	20th	5,286
"	23rd	5,554
"	24th	5,678
"	25th	5,398
"	26th	5,348
"	27th	5,503
Total 23 days.....		128,449 average 5,585 cars per day

241

March	1st, 1909	5,970
"	2nd	6,418
"	3rd	6,154
"	4th	6,285
"	5th	6,115
"	6th	6,222
"	8th	6,781
"	9th	6,881
"	10th	6,621
"	11th	6,551
"	12th	6,629
"	13th	7,034
"	15th	7,217
"	16th	6,969
"	17th	6,909
"	18th	7,126
"	19th	6,745
"	20th	6,781
"	22nd	6,812
"	23rd	6,663
"	24th	6,592
"	25th	6,429
"	26th	6,237
"	27th	6,222
"	29th	6,554
"	30th	6,329
"	31st	6,631
	Total 27 days	177,877, average 6,588 cars per day

242

April	1st, 1909	6,985
"	2nd	6,619
"	3rd	6,573
"	5th	7,783
"	6th	7,951
"	7th	7,643
"	8th	7,520
"	9th	7,378
"	10th	7,257
"	12th	7,873
"	13th	7,681
"	14th	7,080
"	15th	7,365
"	16th	7,163
"	17th	7,574
"	19th	8,572
"	20th	8,294
"	21st	8,128
"	22nd	8,147

"	23rd	8,176
"	24th	8,220
"	26th	8,555
"	27th	8,506
"	28th	8,561
"	29th	8,311
	Total 25 days.....	193,915, average 7,757 cars per day.

343

May	1st, 1909.....	7,799
"	3rd	8,552
"	4th	8,253
"	5th	7,934
"	6th	7,879
"	7th	7,690
"	8th	7,508
"	10th	7,623
"	11th	7,388
"	12th	7,404
"	13th	8,144
"	14th	7,499
"	15th	7,803
"	17th	7,866
"	18th	8,064
"	19th	7,825
"	20th	7,968
"	21st	7,945
"	22nd	7,971
"	24th	8,349
"	25th	8,249
"	26th	8,367
"	27th	8,216
"	28th	8,163
"	29th	7,965
	Total 25 days.....	198,424, average 7,937 cars per day.

244

June	1st, 1909.....	8,639
"	2nd	8,473
"	3rd	8,672
"	4th	8,591
"	5th	8,673
"	7th	8,738
"	8th	8,761
"	9th	8,387
"	10th	7,695
"	11th	8,682
"	12th	8,483
"	14th	8,803
"	15th	8,782

"	16th	8,738
"	17th	8,630
"	18th	8,453
"	19th	7,528
"	21st	8,894
"	22nd	8,711
"	23rd	8,529
"	24th	8,591
"	25th	8,526
"	26th	8,462
"	28th	8,728
"	29th	8,559
"	30th	8,494
Total 26 days.....		222,222, average 8,547 cars per day.

245

July	1st, 1909	8,619
"	2nd	8,651
"	3rd	8,499
"	6th	8,821
"	7th	8,611
"	8th	8,600
"	9th	8,665
"	10th	8,425
"	12th	8,295
"	13th	8,580
"	14th	8,557
"	15th	8,596
"	16th	8,044
"	17th	8,323
"	19th	8,848
"	20th	8,416
"	21st	8,576
"	22nd	8,257
"	23rd	7,756
"	24th	7,660
"	26th	7,805
"	27th	7,904
"	28th	7,211
"	29th	7,631
"	30th	7,675
"	31st	7,332
Total 26 days.....		214,357, average 8,244 cars per day.

246

August	2nd, 1909	7,383
"	3rd	7,274
"	4th	7,180
"	5th	7,044

"	6th	6,992
"	7th	7,011
"	9th	7,229
"	10th	7,235
"	11th	7,226
"	12th	6,809
"	13th	6,522
"	14th	6,182
"	16th	6,945
"	17th	6,929
"	18th	6,951
"	20th	6,867
"	23rd	6,733
"	24th	6,626
"	25th	6,329
"	26th	6,134
"	27th	6,393
"	28th	6,643
"	30th	6,295
"	31st	6,282

Total 24 days..... 163,214, average 6,801 cars per day.

247

September	1st, 1909.....	6,100
"	2nd	6,045
"	3rd	5,943
"	4th	5,933
"	7th	6,428
"	8th	5,952
"	9th	5,877
"	11th	5,416
"	13th	5,747
"	14th	5,611
"	15th	5,364
"	16th	5,275
"	17th	5,113
"	18th	5,079
"	20th	5,317
"	21st	5,148
"	22nd	4,913
"	23rd	4,861
"	24th	4,734
"	25th	4,708
"	27th	4,885
"	28th	5,092
"	29th	4,974
"	30th	4,824

Total 24 days..... 129,439, average 5,393 cars per day.

Grand total 519 days, 3,068,642, average 5,913 cars per day.

248 Cross-examination by Mr. MILLER:

Q. Your name is J. H. Mous?
A. Yes, sir.
Q. Of Carbondale?
A. No, Chicago, Illinois.
Q. You are superintendent of what?
A. I am now Chief Clerk to the General Superintendent of Transportation.
Q. And it was your duty to keep track of the freight cars in the different divisions?
A. At that time I was traveling car agent.
Q. In 1907?
A. Yes, sir.
Q. You say reports from the different divisions come in as to the number of cars, and then your distribution is made from these reports?
A. As to the per cent of each division.
Q. Then that division of cars available for that division were divided up among the mines?
A. Yes, sir.
Q. And made that division of cars according to the output of the mine as shown by their rating?
A. Yes, sir.
Q. You say in 1907 you didn't have enough cars in this division?
A. Yes, sir.
Q. How many cars did you have?
A. I can't say.
249 Q. How much was you short?
A. I can't say.
Q. Then you don't know how many cars you had, or how much you was short but you say you was short, that is all you know?
A. That is all.
Q. But the following year you know how many cars you had?
A. I made a report of surplus we had.
Q. In 1908?
A. Yes, sir.
Q. In 1909 you know how many cars you had every day?
A. Yes, sir.
Q. In 1907 you don't know how many cars you had at all?
A. The records will show.
Q. You made these records?
A. Yes, sir.
Q. Who ordered you to make these records 1908 and 1909 and leave out 1907?
A. The General Superintendent, but he didn't order me to leave out 1907.
Q. You testified of your knowledge you knew there was a shortage of cars in 1907?
A. Yes, sir.
Q. How do you know that without knowing how many cars the company had?

A. In traveling over the road.

Q. In looking over the reports and traveling over the road
250 you know how many cars were short then?

A. I don't know how many.

Q. You know how many cars the Illinois Central owned in this division that year or any other division?

A. I know how many cars the Illinois Central owned about.

Q. How many in 1907?

A. 22 or 2300.

Q. How many did they have in 1908?

A. About the same number.

Q. In 1909?

A. About the same number.

Q. 1906, the year before?

A. I don't remember.

Q. There is about four years the car supply was practically the same 1906, 1907, 1908 and 1909, something near the same number?

A. I didn't say the cars were the same.

Q. Number of cars?

A. Number of cars owned were about the same.

Q. Then the number of cars available—this is the St. Louis division isn't it?

A. Yes, sir.

Q. How would the division superintendent or who ever had that in his charge, distribute these cars among the mines in that division?

Judge KRAMER: I object—he don't know that.

The COURT: It is cross examination—Overruled—I will let
251 it in as cross examination.

To which ruling of the Court, defendant by counsel then and there excepted.

Q. Do you know what means the Division Superintendent used in making distribution of cars among the different mines in his division, do you know how he did it?

A. No, I don't know how he did it—I know how he should have done it.

Q. But you don't know how he actually did it?

A. No.

S. W. SOUBRY called as a witness for the defense:

Judge KRAMER:

Q. Have you a record there that shows the shortage in various divisions during the year of 1907?

A. Yes, sir.

Q. Now you may explain what that shows?

A. It shows on this memorandum the number of coal cars short each day on each division for each month.

Q. Of the Illinois Central Railroad?

A. Yes, sir.

Q. During the year 1907?
A. Yes, sir.
Q. From that statement you there have you may designate to this jury the number of coal cars that the Illinois Central Railroad Company was short of supplying the demands made during the year 1907 among various divisions?

252 A. Yes, sir.
Q. I wish you would give them?
A. By days?
Q. Yes.

253 DEFENDANT'S EX. E.

Shortage Coal Cars.

Jan'y, 1907.

Date.	St. Louis Division.	Springfield Division.	Peoria Division.	Freeport Division.	Louisville Division.	Total.
1/ 3	...	...	...	...	40	40
1/ 3	75	87	10	...	115	287
1/ 4	...	205	...	...	95	300
1/ 5	225	263	20	...	100	608
1/ 7	...	107	20	...	95	222
1/ 8	240	195	10	...	140	585
1/ 9	245	305	20	...	100	670
1/10	250	215	...	...	250	715
1/11	250	160	20	...	120	550
1/12	200	130	...	...	213	543
1/14	100	50	20	...	100	270
1/15	200	155	...	...	225	580
1/16	270	180	...	...	120	570
1/17	350	258	20	...	170	798
1/18	400	200	50	...	168	818
1/19	375	...	20	...	190	585
1/21	...	125	20	...	95	240
1/22	300	195	30	...	195	720
1/23	350	235	...	...	160	745
1/24	350	235	30	...	155	800
1/25	350	76	30	...	240	696
1/26	325	209	40	...	235	809
1/29	300	255	...	...	190	745
1/28	150	75	30	...	90	345
1/30	325	200	15	...	140	680
1/31	300	250	...	...	209	759
	5,930	4,365	405	...	3,980	14,680

254 February, 1907.

Date.	St. Louis Division.	Springfield Division.	Peoria Division.	Freeport Division.	Louisville Division.	Total.
2/ 1	225	203	30	...	190	648
2/ 2	300	268	20	...	160	748
2/ 4	75	180	...	...	20	275
2/ 5	275	270	...	...	202	747
2/ 6	225	285	20	...	220	750
2/ 7	325	240	30	...	213	208
2/ 8	375	245	20	...	218	868
2/ 9	450	157	40	...	98	745
2/11	210	40	25	...	90	365
2/12	275	127	...	...	30	432
2/13	325	247-274†	20	...	215	834
2/14	325	130	...	...	215	670
2/15	250	201	...	...	195	646
2/16	300	185	...	...	85	570
2/18	125	90	...	...	40	255
2/19	125	190	20	...	145	480
2/20	325	230	20	...	160	735
2/21	300	105	20	...	240	665
2/22	350	40	20	...	182	692
2/23	350	120	30	...	260	760
2/25	100	...	40	...	110	250
2/26	300	35	20	...	245	600
2/27	225	145	30	...	140	540
2/28	325	60	...	...	193	578
	6,460	3,920	415	...	3,866	14,661

255 March, 1907.

3/ 1	350	50	20	...	207	627
3/ 2	300	...	...	...	162	462
3/ 4	...	...	15	...	105	120
3/ 5	325	...	...	...	230	555
3/ 6	335	...	...	...	213	548
3/ 7	285	...	...	...	207	492
3/ 8	325	...	...	...	81	406
3/ 9	250	...	...	...	163	413
3/11	...	...	...	...	30	30
3/12	100	...	...	...	124	224
3/13	150	...	...	...	142	292
3/14	150	50	...	...	35	235
3/15	225	...	...	...	75	300
3/16	200	...	...	...	80	280
3/19	100	...	...	...	...	100

[† In pencil in copy.]

Date.	St. Louis	Springfield	Peoria	Freeport	Louisville	Total.
3/18	...	...	...	...	...	...
3/20	100	...	...	...	...	100
3/21	100	...	...	...	...	100
3/22	225	...	...	...	...	225
3/23	220	...	...	...	48	268
3/25	...	...	...	...	25	25
3/26	...	...	...	...	47	47
3/27	...	...	...	...	...	...
3/28	100	...	...	...	76	176
3/29	175	...	...	...	...	175
3/30	75	...	...	...	...	75
	4,090	100	35	...	2,050	6,275

256 April, 1907.

4/ 1	...	...	...	...	...	...
4/ 3	...	...	...	...	...	...
4/ 4	...	...	...	...	...	...
4/ 5	...	...	...	...	...	...
4/ 6	...	...	...	...	...	...
4/ 8	...	...	...	...	...	...
4/ 9	...	...	...	...	...	...
4/10	...	...	...	...	...	...
4/11	...	...	...	...	...	...
4/12	...	...	...	...	...	...
4/13	...	...	...	...	...	...
4/15	...	...	...	...	...	...
4/16	...	...	...	...	...	...
4/17	...	...	...	...	...	...
4/18	125	...	...	...	...	125
4/19	190	...	...	...	...	190
4/20	200	135	...	...	...	335
4/22	...	...	...	...	...	...
4/23	110	...	...	...	50	160
4/24	200	45	30	...	110	385
4/25	200	80	20	...	200	500
4/26	175	60	23	...	255	523
4/27	200	...	...	...	173	373
4/29	...	...	...	...	100	100
4/30	125	135	...	...	200	460
	1,525	455	73	...	1,098	3,151

257 May, 1907.

5/ 1	175	80	37	...	185	477
5/ 2	175	120	20	...	145	460

Date.	St. Louis Division.	Springfield Division.	Peoria Division.	Freeport Division.	Louisville Division.	Total.
5/ 3	225	155	...	...	160	540
5/ 4	250	125	10	...	155	540
5/ 6	...	75	25	...	50	150
5/ 7	150	175	20	...	70	415
5/ 8	50	185	10	...	30	275
5/ 9	225	205	20	...	40	490
5/10	175	175	40	...	70	460
5/11	115	185	...	...	75	375
5/13	...	60	30	...	...	90
5/14	...	130	...	...	...	130
5/15	...	200	30	...	128	358
5/16	...	255	...	...	125	380
5/17	150	90	40	...	75	355
5/18	...	160	20	...	100	280
5/20	...	50	20	...	...	70
5/21	...	75	30	...	25	130
5/22	...	130	40	...	45	215
5/23	...	210	35	...	70	315
5/24	...	200	20	...	55	280
5/25	...	205	25	...	32	262
5/27	...	...	...	...	...	...
5/28	...	130	...	...	...	130
5/29	...	180	...	...	45	225
5/31	...	...	...	...	35	35
	1,690	3,560	472	...	1,710	7,437

258 June, 1907.

6/ 1	225	...	...	...	50	275
6/ 3	...	...	...	...	...	...
6/ 4	75	30	...	...	65	170
6/ 5	300	55	...	...	60	425
6/ 6	325	...	...	...	35	360
6/ 7	300	40	...	...	175	515
6/ 8	225	...	...	...	105	330
6/10	...	...	...	...	35	35
6/11	...	...	...	...	40	40
6/12	...	65	...	...	210	275
6/13	225	50	...	...	185	460
6/14	125	33	...	...	145	303
6/15	170	...	...	...	128	298
6/17	...	...	...	...	74	74
6/18	...	...	...	...	207	207
6/19	...	50	...	...	118	168
6/20	125	75	...	...	181	381
6/21	225	50	...	...	180	443
6/22	175	75	...	...	168	453

Date.	St. Louis Div.	Springfield Div.	Peoria Div.	Freeport Div.	Louisville Div.	Total.
6/24	...	100	...	...	203	180
6/25	200	110	...	...	80	493
6/26	350	165	...	...	183	705
6/27	275	185	...	...	190	758
6/28	275	195	...	...	298	763
6/29	175	125	...	...	293	420
	3,770	1,413	...	...	3,348	8,531

259 July, 1907.

7/ 1	...	40	...	...	130	170
7/ 2	50	...	...	...	100	150
7/ 3	150	125	...	...	188	463
7/ 5	...	40	...	...	161	201
7/ 6	50	...	...	...	162	212
7/ 8	...	...	...	...	70	70
7/ 9	...	...	...	...	125	125
7/10	...	...	...	...	100	100
7/11	75	...	...	...	55	130
7/12	...	...	...	...	194	194
7/13	75	...	...	...	174	249
7/15	...	...	...	...	...	...
7/16	...	...	...	...	60	60
7/17	75	...	...	...	80	155
7/18	150	...	...	...	80	230
7/19	175	...	...	...	100	127
7/20	250	...	...	...	28	278
7/22	50	...	...	...	...	50
7/23	225	...	...	...	40	265
7/24	250	50	...	...	110	410
7/25	200	35	...	...	122	357
7/26	250	40	...	...	118	408
7/27	200	30	...	...	225	455
7/29	...	70	...	...	25	95
7/30	125	145	...	...	110	380
7/31	200	215	...	...	158	573
	2,550	790	...	...	2,715	5,055

260 August, 1907.

8/ 1	290	185	...	...	170	645
8/ 3	235	155	...	...	35	425
8/ 2	175	160	...	...	115	450
8/ 5	50	135	...	...	...	185
8/ 6	310	140	...	...	63	513
8/ 7	185	225	25	...	45	481

Date.	St. Louis Div.	Springfield Div.	Peoria Div.	Freeport Div.	Louisville Div.	Total.
8/ 8	285	145	19	...	37	486
8/ 9	260	135	22	...	14	431
8/10	285	120	33	...	50	488
8/12	...	...	...	...	...	...
8/13	300	125	40	...	...	465
8/14	85	200	...	...	60	515
8/15	180	65	...	...	90	335
8/16	180	150	23	...	110	463
8/17	285	50	22	...	100	457
8/19	...	115	20	...	180	315
8/20	50	110	22	...	180	362
8/21	...	120	27	...	185	332
8/22	235	150	25	...	200	610
8/23	215	115	15	...	180	525
8/24	180	71	25	...	175	451
8/26	...	85	...	...	110	195
8/27	195	60	...	...	60	315
8/28	200	42	25	...	100	367
8/29	215	125	33	...	145	518
8/30	225	65	18	...	100	408
8/31	305	225	33	...	197	760
	5,095	3,273	427	...	2,701	11,496

261 September, 1907.

9/ 2	...	...	...	...	...	...
9/ 3	...	...	...	...	...	...
9/ 4	...	70	33	...	140	243
9/ 5	235	90	...	...	40	365
9/ 6	240	160	32	...	175	609
9/ 7	350	125	31	...	185	691
9/ 9	125	60	20	...	22	227
9/10	245	125	30	...	50	450
9/11	275	235	28	...	100	638
9/12	360	210	35	...	60	665
9/13	375	175	40	...	170	760
9/14	225	160	30	...	50	465
9/16	...	...	20	...	95	115
9/17	310	25	30	...	30	395
9/18	300	110	30	...	60	500
9/19	90	115	28	...	70	303
9/20	450	200	30	...	135	815
9/21	425	110	28	...	150	713
9/23	225	25	30	...	30	310
9/24	310	180	23	...	50	563
9/25	300	195	37	...	80	612
9/26	300	150	30	...	185	665

Date.	St. Louis Div.	Springfield Div.	Peoria Div.	Freeport Div.	Louisville Div.	Total.
9/27	350	250	31	...	210	841
9/28	325	225	25	...	80	655
9/30	...	65	33	...	150	238
	5,815	3,060	644	...	2,317	11,836

262 October, 1907.

10/ 1	275	115	27	...	240	657
10/ 2	350	258	23	...	295	926
10/ 3	160	60	23	...	250	493
10/ 4	325	273	21	...	245	864
10/ 7	100	...	26	...	60	186
10/ 8	300	55	30	...	195	580
10/ 9	325	197	32	...	170	724
10/10	350	130	20	...	195	695
10/11	325	230	23	...	225	803
10/12	340	...	20	...	265	625
10/14	...	...	21	...	100	121
10/15	225	...	...	...	265	490
10/16	275	50	...	...	265	590
10/17	275	85	...	...	245	605
10/18	270	115	...	...	275	600
10/19	250	50	...	...	230	530
10/22	150	240	...	...	255	645
10/23	225	150	...	...	140	515
10/24	265	170	10	...	300	745
10/25	310	185	...	...	200	695
10/26	275	95	...	...	230	600
10/28	100	60	...	...	35	195
10/29	275	115	...	...	190	580
10/30	260	89	...	...	95	440
10/31	315	110	...	...	175	600
	6,320	2,832	276	...	5,140	14,568

263 November, 1907.

11/ 1	350	125	30	...	175	680
11/ 2	350	65	30	...	260	705
11/ 4	100	24	20	...	75	219
11/ 5	300	...	40	...	90	430
11/ 6	335	55	45	...	65	500
11/ 7	300	75	45	...	70	490
11/ 8	245	105	25	...	40	415
11/ 9	310	90	25	...	105	530
11/11	...	100	10	...	...	125
11/12	210	90	78	...	...	310

Date.	St. Louis Div.	Springfield Div.	Peoria Div.	Freeport Div.	Louisville Div.	Total.
11/15	325	60	20	...	180	583
11/14	300	120	18	...	20	460
11/13	200	65	15	...	80	363
11/17	270	90	20	...	20	405
11/18	...	...	15	...	...	20
11/19	225	...	21	...	20	260
11/20	180	...	25	...	20	221
11/21	50	35	25	...	60	170
11/22	210	...	31	...	115	350
11/23	355	...	25	...	190	556
11/25	...	...	...	...	60	60
11/26	225	...	...	...	50	275
11/27	245	...	...	...	50	295
11/29	100	...	...	...	80	180
11/30	125	...	...	...	50	175
	5,290	1,099	503	...	1,885	8,777

264 December, 1907.

12/ 2	...	...	...	...	...	...
12 /3	...	...	...	...	75	75
12/ 4	50	25	...	...	...	75
12/ 5	60	65	...	...	105	230
12/ 6	210	30	...	...	150	390
12/ 7	180	...	...	...	100	280
12/ 9	...	...	...	...	...	...
12/10	...	...	...	...	...	...
12/11	175	...	...	...	...	175
12/12	135	35	...	...	15	185
12/13	190	...	...	...	75	265
12/14	155	...	...	...	25	180
12/16	...	...	...	...	...	...
12/17	...	...	...	...	...	...
12/18	...	...	...	...	...	...
12/19	78	20	...	...	...	95
12/20	105	25	...	...	...	130
12/21	...	...	...	...	...	...
12/22	...	...	...	...	...	...
12/23	...	...	...	...	...	...
12/24	...	...	...	...	...	...
12/26	...	...	...	...	...	...
12/27	...	...	...	...	...	...
12/28	...	...	...	...	...	...
12/30	...	...	...	...	...	...
12/31	...	...	...	...	...	...
	1,335	200	...	...	...	...

265 Cross-examination by Mr. MILLER:

Q. Who made that list?
A. Made up in my office, I didn't make it personally—but it was made under my supervision.
Q. You have the number of cars in each division—that means number of cars short in each division each day?
A. Yes, sir.
Q. You were short the whole year?
A. Well some days, and some periods not short.
Q. Will you look at the last entry you have for the last of the year and see what it is, 1907?
A. December 31st, 1907 no shortage on that day.
Q. What is it the day before?
A. No shortage from the 20th of December to the end of the month.
Q. When did your shortage cease?
A. December 20th.
Q. How much short then?
A. 130 cars.

GEORGE H. WHITESIDE, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Judge KRAMER:

Q. State your name.
A. George H. Whiteside.
Q. Where do you reside?
266 A. East St. Louis.
Q. What is your business?
A. Train Master for the Illinois Central Railroad.
Q. What was your business during the year 1907?
A. Chief Train Dispatcher for the Illinois Central R. R.
Q. Where were you employed?
A. Carbondale, Illinois.
Q. I wish you would explain to the jury what your duties were as car dispatcher?
A. To distribute freight car equipment.
Q. On what division?
A. St. Louis division.
Q. In that, did you have to distribute coal cars among the coal operators located on that line?
A. Yes, sir.
Q. You know the plaintiff in this case, Mulberry Hill Coal Company?
A. Yes, sir.
Q. Do you know where the mine of the Mulberry Hill Coal Company is located?
A. Yes, sir.
Q. Where?
A. In St. Clair County, between Belleville and Freeburg.
Q. Is it on the St. Louis division?

A. Yes, sir.

Q. I wish you would explain to the jury the method that was employed by the Illinois Central Railroad, in the St. Louis division, in the distribution of its coal cars among the operators during
267 the year 1907?

A. We first arrived at the rating capacity of the mine and we distributed the cars that were available to the different mines.

Q. How did you get at the rating of the mines?

A. They were rated in accordance with what the physical output was.

Q. How did you get at that, what method did you employ to get at that?

A. By comparison with the work they had turned out—we at that time took a period of four consecutive days when the mine was given all the cars they could load.

Q. When was that—the four consecutive days?

A. That was 1906 and 1907, I think.

Q. About when did you commence that, and how long did you continue?

A. I think from September 1st, 1906 to the 1st of August 1907.

Q. If you made any change in the latter part of August or 1st of September 1907 what did you do?

A. My recollection after 1907 we changed it to 15 day period, based on what they had done.

Q. What reason was there for making that change, if any?

A. Well it appeared some operators had used sharp practice and put in more force working those days than they did other days.

Q. How were the cars furnished your division?

A. Well, we picked up cars that were made empty, those which were returned to us by connecting railroads, and took those which were delivered to us by connecting divisions.

268 Q. Who had supervision of the division?

A. I reported in the matter and received instructions from the Superintendent of Transportation, O. S. Keith.

Q. Did you report the amount of equipment you picked up so it could be taken into account?

A. Yes Sir.

Q. Now state whether or not there—what was the supply of coal cars for hauling coal in your division during the year 1907?

A. It is rated from——

Q. What I want to know whether or not there was a shortage?

A. There was a shortage, yes sir.

Q. During that year?

A. Practically during the year 1907 as I remember.

Q. I will ask you to state whether or not during that entire year the same method was employed to ascertain the capacity of mines of all the mines located in the division.

A. Same method applied.

Q. I will ask you whether or not during that year 1907 when there was a shortage of coal cars, whether or not all of the available

equipment for hauling coal was distributed among operators in your division?

A. Yes, all that was available.

Q. Now do you know what these reports are here?

A. Well, yes this is Number 1 mine report.

Q. What do they show?

A. It shows the cars which are ordered by the mine, and shows the rating capacity of the mine, number of cars we furnished
269 them and number of cars and tons they loaded, and cars left over, number of hours they worked and——

Q. These reports you have there are they daily reports with reference to the Mulberry Hill Coal Mine during the year 1907?

A. During the year 1907—from the record in the previous case these reports have been copied from the original.

Q. These reports that come from you to our agent?

A. Yes, sir.

Q. These reports contain the information that is made up by our agent and sent to you?

A. Yes, sir.

Q. What was the capacity of this mine, Mulberry Hill Coal Mine during the 1st part of the year 1907?

A. I think it was 150 tons per day.

Q. They were claiming 200 tons?

A. They often ordered more coal than the rating showed they could load.

Q. You don't know where the originals are do you?

A. My recollection they were filed among the records of the Court.

Q. These were gotten up by the reporter?

A. They were copied by the reporter.

Q. Look at these.

A. These reporta appear to be during the month of Jan. 1907.

Q. Every one you have there?

A. Yes, sir that is just the month of January.

270 Q. What are those others?

A. This is a transcript of that record.

Q. Now Mr. Whiteside you say during the year 1907 there was a shortage of cars, latter part of 1907, you know why?

A. As I remember there was a falling off in the demand for coal orders—were not so many cars ordered for loading and as a consequence the shortage reduced until possibly in the latter part of the year there was a surplus.

Q. What was the condition during the year 1908 with reference to the supply?

A. Was surplus of equipment practically all of the year.

Q. When did that begin?

A. Along about the latter part of 1907 and extended on I think in 1908 and 1909.

Q. Have you a statement prepared with reference to the condition of the Mulberry Hill Coal Company, its equipment during the entire year of 1908 and part of 1909?

Mr. WINKLEMANN: I object to that, I don't see how that would cut any figure in the case.

Q. Are you able to state, commencing with the 1st of January 1908, the amount of cars that were ordered by the Mulberry Hill Coal Company?

A. Well, this transcript is personally made by the operator, and explains from the 1st of January, 1908 to October 31, 1909 which deals in tons, and days no cars needed.

271 Q. Are you able to state the number of cars or tons that were ordered the 1st day of January?

A. Yes, sir that day was a holiday and none then.

Q. Are you able to state the number of tons that were ordered by the plaintiff in this case on the second day of January?

A. Yes, sir.

Q. How many tons were ordered?

A. 525 tons.

Q. How many tons furnished?

A. 860.

Q. How many tons were loaded?

A. There was 690.

Q. How many tons unbilled?

A. 80.

Mr. WINKLEMANN:

Q. You got this information from the agent of Freeburg didn't you?

A. I took this statement from the information furnished me by the agent of Freeburg, which is accepted in the conduct of business.

Q. Where did you get this information from?

Judge KRAMER: Let me interrogate him first Mr. Winklemann.

Q. This is made up from files in your office?

A. Yes, sir.

Q. Furnished to you, and you made this up yourself?

A. Personally, yes.

Q. It is upon this information you make distribution of cars?

A. Yes, sir.

272 Cross-examination by Mr. MILLER:

Q. That is made from reports received by you from the agent at Freeburg?

A. Yes, sir.

Q. You don't know whether they are correct or not?

A. I know this is correct—this was made, was taken from the report rendered me by the agent at Freeburg and upon which the distribution is made.

Q. You got it from the report of the agent at Freeburg, you don't know from you- own knowledge, whether the agent at Freeburg made a correct report or not.

A. I judge it is correct.

Q. You believe it is correct, but you don't know?
A. I haven't anything from the mine people themselves, and was not personally at the mine.
Q. You can't swear to it whether it is correct or not?
A. I can say these are the facts upon which distribution was made.
Q. But it is a report from the agent at Freeburg, that is what it is ain't it?
A. Yes, sir.

Judge KRAMER: I am having him testify the nature and condition upon which he made these distributions. I am not asking to introduce that, I am asking him to testify as to how he made it.

The COURT: Of course, it is based on hearsay, I don't see
273 why this shouldn't be connected up properly before it would be admissible.

Judge KRAMER: Is this information that you have there information upon which you make the distribution of cars in your office.
A. Information upon which I make the distribution.
Q. Can you state now whether or not the Mulberry Hill Coal Company had surplus of cars during the year 1908?
A. Well, yes I know there was a surplus of cars at the time at different times, but the exact periods I can't say—from my own knowledge, I wasn't there every day, but I was at the mines one or two times and I know they had equipment they didn't use, and from the records I have during most of the time from January 1st 1908 to October 31st 1909 there was surplus of equipment.
Q. Now I will ask you during the year 1907, on these 99 days complained of in the declaration of this suit, that they did not have the amount of cars they demanded, whether or *or* not during that time all of the available equipment that the company had was distributed among all operators pro rato as you testified.

Mr. WINKLEMANN: I object.
The COURT: Overruled.
To which ruling of the court, plaintiff by counsel than and there excepted.

A. Yes, sir.

274 Cross-examination by Mr. WINKLEMANN:

Q. How do you know was all distributed.
A. Well, from the information I have from the various sources, which information is correct.
Q. You are testifying here from what somebody else reported or told you as to how this distribution was made?
A. From the system we have in affect.
Q. How many divisions have you in that entire system?
A. Six divisions, I believe only six where we have coal.
Q. This list gives only five I believe.
A. Well, I don't know, I have nothing to do with them except in the St. Louis Division.

Q. St. Louis, Springfield, Peoria, Freeburg and Louisville.
A. Well——
Q. Your duties were connected with the St. Louis division alone?
A. Confined to the St. Louis division.
Q. Tell the jury by what means you distributed cars in the St. Louis division.
A. Pro-rated the cars according to the capacity.
Q. Tell us how you did that in 1907.
A. We knew what the percentage of the mine was, knew what percentage they had received and distributed them so as to get the percentage as near the same as possible.
Q. How many mines were included in your division?
A. I believe 84.
Q. Then all the cars you had of your equipment, ready
275 for service you divided them up among these 84 mines.
A. Yes, sir.
Q. How many cars in 1907 on an average did you have that was in shape for duty?
A. I can't answer that off hand.
Q. I believe you said during the year 1907, practically during the entire year there was a shortage of coal cars?
A. That is my recollection.
Q. That shortage was from 45 to 50 per cent on equipment?
A. Something near about that.
Q. What was it in 1906?
A. I think was less shortage, as a whole it came near being equal except during the first part of 1906 was a shortage then was a surplus for two or three months from possible April and May—when the mines resumed work May 1st or June 1st was a surplus of equipment until sometime in the fall.
Q. The latter part of 1907 you say you had a surplus?
A. That is my recollection.
Q. December 1907 when you had no shortage, if the Mulberry Hill Coal Company ordered cars you sent them?
A. Not always.
Q. You didn't send them when you didn't have a shortage?
A. Not always.
Q. In these days you have listed St. Louis division no shortage if the cars were ordered that day, why wouldn't you give them to them?
A. Physical conditions was such I couldn't get cars to the mine.
276 Q. Were there any conditions in 1907 that -revented you getting cars to Mulberry Hill Coal Mine?
A. Yes, sir on some days.
Q. What were they?
A. Well the conditions in the yards——
Q. Where your order shows you had surplus in December 1907, when an order came from the mine, if cars were empty and classed as surplus they were ready for duty?
A. If we had them.

Q. Why didn't you send them if they were ready for duty?
A. Couldn't get them there.
Q. See if that is your signature?
A. Yes I signed that under Mr. Clift's name.
Q. Who is A. E. Clift?
A. He is now General Superintendent, at that time was Division Supt. charge of this division.
Q. You signed A. E. Clift to that paper?
A. Yes, sir.
Q. At his request?
A. Yes, sir.
Q. Were you in his office at Carbondale?
A. Yes, sir.
Q. Written by you?
A. Yes, sir.
Q. You know anything about receiving a letter from me prior to this answer that you wrote?
277 A. I presume I did, I don't remember.
Q. This was a response to a letter concerning distribution of cars.
A. It appears to have been.

Redirect examination by Judge KRAMER:

Q. That letter, whatever it was, was written to Mr. Miller in response to some letter he wrote?
A. Yes, sir.
Q. You haven't the letter that was written by Mr. Miller to Mr. Clift?
A. I have not.
Q. This is a reply to it?
A. Yes, sir.
Q. You don't know where that letter is?
A. No, I do not.
Q. In the distribution of cars, when there is a shortage Mr. Whiteside, and you are unable to furnish the operators all the cars demanded, do you furnish enough to run for a whole day or for parts of days?
A. Well we would rather furnish them for whole days.
Q. How about the operators?
A. Well, they are divided, some have requested we give them what we are able to, while others——

Mr. MILLER: I object to what some operators request.

278 Q. What is the rule of the company with reference to distributing cars for part of days or distributing cars so the mine can run full days?

The COURT: You may answer.
To which ruling of the Court, plaintiff by counsel, then and there excepted.

A. The company would rather deliver a full day's run, but the

mine owners and operators are divided, some desire to be given cars each day, while others would rather have a full day's supply.

Mr. WINKLEMANN: I would like to call Mr. Miller to identify this letter.

The COURT: It is out of order, but I will permit it.

Mr. MILLER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. WINKLEMANN:

Q. I want to know Mr. Miller how this letter come to you, and how you were acting at the time?

Judge KRAMER: I object to that, the letter is written to Mr. Miller in response to another letter.

The COURT: Overruled.

To which ruling of the court, defendant by counsel then and there excepted.

A. I was representing the coal company and wrote the letter at their request—this is the letter I received in reply to my letter through the mails.

279 FRED NOLD, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Judge KRAMER:

Q. You know how the operators of coal mines prefer to have coal cars furnished them when there is a shortage of cars when they don't get all they are demanding, as to whether or not they want them furnished for parts of days or so furnished so they can run full days?

Mr. MILLER: Object to that.

The COURT: That is improper unless confined to this particular mine.

Q. I will ask you, how you as operator here during the time when there was a shortage of cars, when they couldn't furnish you all the cars you demanded, whether or not you would like to have them?

Mr. MILLER: I object.

The COURT: Overruled.

To which ruling of the Court, plaintiff by counsel then and there excepted.

A. What is the question?

Q. When there is a shortage—I will ask you, how you as operator here during the time when there was a shortage of cars, when they couldn't furnish you all the cars you demanded, whether or not you would like to have them furnished for parts of days, or for a full day's run?

A. How we would like to have them furnished—like to have some every day.

Q. Would miners work at your mine if you furnished them that way?

280 A. Yes Sir, certainly.

Q. Well, if there are only enough cars to work part of the time will they work that way?

A. Yes Sir.

Q. They prefer to have them that way do they?

A. Well, the company would prefer.

Q. How about the miners, how are they?

A. I don't know about the miners.

Q. Will the miners work unless there are enough cars in sight to work a full day?

A. Yes certainly.

Q. Don't they often refuse to work unless enough cars — in sight to work a full day?

A. No, sir, not once have they refused to work at our place.

Q. How many cars do you have to have at a time to run the mine?

A. Well that depends upon what we load.

Q. If you are running screen coal?

A. It would take two cars to load screen coal.

Q. Two at a time?

A. Yes, sir.

Defendants rest.

The plaintiff, to further sustain the issues upon its part, offers the following evidence in rebuttal:

Mr. WINKLEMANN: We offer this letter, which has been identified sufficiently in evidence by Mr. Miller.

281 Judge KRAMER: We object.

The COURT: Overruled.

To which ruling of the Court, defendant by counsel then and there excepted.

(Here insert Ex. D.)

Illinois Central Railroad Company.

I. C. G. H. W. CARBONDALE, ILL., *Apr.* 11, 1907.

Mr. Jas. O. Miller, 22 South Illinois Street, Belleville, Illinois.

DEAR SIR: I have your letter of the 10th; in regard to Mulberry Hill mine not working.

I beg to advise, that our records do not agree with yours; our records show you did not work Saturday 6th; on account of three cars in mine in the evening, being misplaced by some one during the night. We knew nothing about this, consequently could not arranged for them to be placed Friday night, for you to work Saturday. You worked eight hours Monday the 8th; and on the 9th we failed to get you equipment, and you could not work on the two partly loaded cars, which were left over.

There are plenty of cars, and we want to keep you supplied. You are mistaken that Mulberry Hill mine is always short, and we will endeavor now to give this mine all the cars they can load.

Yours truly,

(Signed) A. E. CLIFF,
Superintendent Whiteside.

(Plaintiff's Ex. 2 D.)

282 Defendants to further sustain the issues upon their part, introduced the following evidence in rebuttal:

Mr. WHITESIDE recalled for further examination.

By Judge KRAMER:

Q. Do you know the condition then along during the month of April, 1907, about the——
A. Yes, sir.
Q. What was the condition about the time that letter was written, from that time during the remainder of the month of April?
A. Right at that particular time we had surplus of cars.

(Reads evidence of Orlando S. Keith from the old record.)

ORLANDO S. KEITH, sworn for the defendant, testified as follows:

By Judge KRAMER:

Q. Give your name to the jury, Mr. Keith.
A. Orlando S. Keith.
Q. Where do you reside, Mr. Keith?
A. Chicago.
Q. What is your business?
A. Superintendent of Transportation of the Illinois Central Railroad Company.
Q. How long have you held that position?
A. About five years.
Q. I wish you would tell briefly to the jury what your duties as superintendent of transportation are.
283 A. It is my duty to distribute the cars between the various divisions of the system.
Q. Are you familiar with the lines of the Ilinois Central Railroad Company, Mr. Keith?
A. Yes, sir.
Q. I will show you a little railroad map here and will ask you whether that represents the lines of the Illinois Central Railroad Company?
A. It does.
Q. Are the lines in this little map I have shown you, Mr. Keith, the lines of the Illinois Central Railroad Company?
A. Yes, sir.
Q. In what states of the Union do the lines of the Illinois Central Railroad Company run?

A. Nebraska, Minnesota, South Dakota, Iowa, Wisconsin, Illinois, Indiana, Kentucky, Tennessee, Mississippi, Louisiana and Alabama.

The map just identified by witness is marked Def't's Exhibit "A."

Q. Mr. Keith, I now hand you another map here and will now ask you to tell what that represents.

A. This map represents the divisions upon which coal mines are located, and also shows the location, of course.

Q. On the lines of the Illinois Central Railroad Company?

A. Yes, sir.

Q. Are the mines all named in the divisions in which they
284 belong?

A. Yes, sir.

Q. All of them?

A. Yes, sir.

Judge KRAMER: I will ask that this map be marked as an exhibit.

The said map is marked Def't's Exhibit "B."

Q. I will ask you in what states of the Union coal mines on the Illinois Central Railroad are located.

A. In Illinois, Indiana, and Kentucky.

Q. I will ask you to state whether or not the Illinois Central Railroad Company is engaged and was in the year 1907 engaged in Interstate Commerce?

A. Yes, sir.

Q. Had it for a number of years prior to that been engaged in Interstate Commerce?

A. Yes, sir.

Q. Now I will ask you whether or not you are familiar with the transportation of coal in a general way from the mines located along the lines of the Illinois Central Railroad Company, and particularly in the state of Illinois?

A. Yes, sir.

Q. Where does the coal in a general way, Mr. Keith, where is it transported to?

A. From Ilinois?

Q. Yes, sir.

285 A. A large part of it goes to points south of the Ohio River -long points on our railroad and other stations, and other yards south of the Ohio River; and a large portion of it goes west of the Mississippi river and beyond St. Louis; a large portion of it goes to St. Louis and Chicago and beyond and a large amount of it goes to Iowa, Minnesota, Nebraska and northwest, all over the northwest, some of it to northern Indiana, Michigan and Illinois points.

Q. What proportion, Mr. Keith, would you say, of the output of the mines in Illinois goes to points other than in the state of Illinois?

A. I think sixty per cent at least.

Q. Now I would like for you to state fully—well, was that true do you think sixty per cent of the output of the mines in Illinois located along the line of the Illinois Central Railroad Company went to points other than the State of Illinois, during the year 1907?

A. Yes, sir.

286 Defendant rests in rebuttal.

FRED NOLD recalled by Mr. Miller for further examination in rebuttal for the plaintiff:

Mr. MILLER:

Q. Mr. Nold — said you made a mistake yesterday when you testified in regard to the condition of the basis on which you put the rental value of the mine, what was that you wanted to explain?

A. Well I said we based the rental value on the money invested, which is not altogether that, but also on the condition of the mine; the mine is newly equipped mine with new machine, engines, boilers, smokestacks, shaker screens, etc.; and of course, would be quite a bit of wear and tear on that which would have to be figured in the same as money invested.

Q. That is the basis you put it on?

A. Yes, sir.

The foregoing was all the evidence introduced on the trial of this cause.

287 And thereupon counsel for defendant presented the following motion to the Court, to-wit:

STATE OF ILLINOIS,
County of St. Clair, ss:

In the Circuit Court, to the April Term, A. D. 1912.

MULBERRY HILL COAL COMPANY
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

Case.

Motion to Dismiss for Want of Jurisdiction.

And now, after the close of all the evidence offered in the above entitled suit, comes the defendant, Illinois Central Railroad Company by John G. Drennan and Kramer, Kramer & Campbell, its attorneys, and moves the court to dismiss said suit, and for grounds of said motion the defendant assigns the following:

First. Because the evidence in this case shows that the plaintiff was, at the time it made the demands for the cars as alleged in its declaration, shipping coal from its said mine located in the State of

Illinois to points in States other than the state of Illinois, and that it made the demands for cars as alleged in its declaration for the purpose of shipping coal from its said mine located in the State of Illinois to points in States other than the State of Illinois.

Second. Because the cars which plaintiff demanded be delivered at its said mine located in the State of Illinois as alleged in
288 its said declaration were to be used in transporting coal from its said mine to points in States other than the state of Illinois, and were to be used in interstate traffic.

Third. Because the cars which the plaintiff demanded be delivered to its said mine located in the state of Illinois were to be used in interstate commerce; that is, in hauling coal from plaintiff's said mine located in the State of Illinois to points in States other than the State of Illinois, and this Court has no jurisdiction of said matter.

Fourth. Because this suit involves the duty of the defendant to deliver cars at a coal mine of the plaintiff located in the State of Illinois during a period of time when there was a shortage of cars; that is to say, during a period of time when the defendant did not have a sufficient number of cars to supply all of the operators of coal mines located on its lines with all the cars demanded by them to be loaded with coal as the same was mined and hoisted from said mines; and during said period of time the plaintiff was shipping and transporting from its said mine the greater portion of the coal mined in its said mine to points in States other than the State of Illinois; and the other operators of coal mines located on the lines of said defendant in the State of Illinois were, during said period of time, shipping and transporting a greater portion of the coal mined from their said mines to points in States other than the State of Illinois and the demands of Plaintiff for cars to be delivered at its said mine during said period of time involved in this suit were for cars to ship
289 and transport coal from its said mine to points in states other than the State of Illinois; and during said period of time the other operators located on the lines of said defendant in said State of Illinois were making demands for cars to use in shipping and transporting coal from their said mines to points in States other than the State of Illinois; and therefore this suit involves the question of the manner in which the defendant should distribute coal cars among the operators located along its said lines at a time when there was a shortage of cars; or in other words, at a time when it did not have a sufficient amount of cars to furnish all of said operators located along its said lines with all cars demanded by them respectively, and which they were ready and willing to load at their said mines respectively; and the Federal Government by Act of Congress has vested the power and authority in the Interstate Commerce Commission of the United States of determining the method and manner in which cars for such shipments are to be distributed among operators of coal mines, and until said Interstate Commerce Commission has acted in such matter this court is without jurisdiction in said matter.

Fifth. Because the statute of the State of Illinois in relation to furnishing cars at stations located on the lines of railroads for the transportation of freight on demands made by shippers of freight

and relied upon as grounds of recovery, in this suit, and being the necessary basis for this suit, cannot be enforced in relation to furnishing cars for operators of coal mines located on the lines of railroads engaged in Interstate Commerce, and said statute ap-
290 plied in this case is a burden on Interstate commerce and is repugnant to the commerce clause of the constitution of the United States.

Sixth. The evidence in this case shows that the defendant, Illinois Central Railroad Company, was at the time involved in this case, engaged in interstate commerce in relation to transporting coal from coal mines located on its line in the State of Illinois to points in States other than the State of Illinois; that as to this defendant, during said time, the statute of the State of Illinois requiring railroad companies to furnish cars at stations located on their lines for the transportation of freight as the same is offered by shippers for transportation cannot be enforced against this defendant during the time involved in this suit in relation to furnishing cars at coal mines located on the lines of the defendant for the transportation of coal, therefrom, because the enforcement of such statute would be a burden upon interstate commerce and repugnant to the provisions of the constitution of the United States in relation to interstate commerce and therefore said statute as to this defendant in this suit is unconstitutional and void.

Seventh. Because it appears from the evidence in this case that only the Interstate Commerce Commission has jurisdiction of the matters and things involved in this suit, and it does not appear that any order has been made by said Commission in the premises, and therefore this Court is without jurisdiction.

Eighth. That this Court has no jurisdiction to entertain
291 or redress the grievances complained of until and unless an order *I* respect thereto has been made by the Interstate Commerce Commission.

(Signed) JOHN G. DRENNAN AND
KRAMER, KRAMER & CAMPBELL,
Attorneys for Defendant.

But the Court denied the said motion.

To which action and decision of the Court in denying the said motion, the defendant, by its counsel than and there excepted.

And thereupon defendant presented to the Court the following motion, to-wit:

STATE OF ILLINOIS,
St. Clair County, ss:

In the Circuit Court, to the April Term, A. D. 1912.

MULBERRY HILL COAL COMPANY
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

Case.

And now at the close of all the evidence offered in the above entitled cause, comes the defendant by Kramer, Kramer & Campbell, its attorneys, and moves the Court to exclude from the jury all of the evidence offered in the above entitled cause, and to instruct the jury to return a verdict in favor of the defendant herein, and for grounds of said motion the defendant shows the following:

292 First. The statute of the State of Illinois in relation to furnishing cars at stations located on the lines of railroads for the transportation of freight on demands made by shippers of freight and relied upon as grounds of recovery in this suit, and being the necessary basis for this suit, cannot be enforced in relation to furnishing cars for operators of coal mines located on the lines of railroads engaged in Interstate Commerce, and said statute applied in this case is a burden on interstate commerce and is repugnant to the commerce clause of the constitution of the United States.

Second. The evidence in this case shows that the defendant Illinois Central Railroad Company, was, at the time involved in this case, engaged in interstate commerce in relation to transporting coal from coal mines located on its line in the State of Illinois to points in States other than the State of Illinois; that as to this defendant, during said time, the statute of the State of Illinois requiring railroad companies to furnish cars at stations located on their lines for the transportation of freight as the same is offered by shippers for transportation, cannot be enforced against this defendant during the time involved in this suit in relation to furnishing cars at coal mines located on the lines of the defendant for the transportation of coal therefrom, because the enforcement of such statute would be a burden upon interstate commerce and repugnant to the provisions of the constitution of the United States in

293 relation to interstate commerce and therefore said statute as to this defendant in this suit is unconstitutional and void.

And the defendant presents herewith a written instruction in that behalf.

(Signed) JOHN G. DRENNAN AND
KRAMER, KRAMER AND CAMPBELL,
Attorneys for Defendants.

The Court instructs the jury to find for the defendant in this cause and to return the following verdict:

"We, the jury, find the defendant not guilty."

Refused.

But the court denied the said motion and refused to give said instruction to the jury—To which action and decision of the Court in denying the said motion and refusing to give the said instruction to the jury the defendant, by its counsel then and there excepted.

294 And thereupon the defendant presented to the Court the following motion to-wit:

STATE OF ILLINOIS,
County of St. Clair, ss:

In the Circuit Court, to the April Term, A. D. 1912.

MULBERRY HILL COAL COMPANY
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

Case.

And now at the close of all the evidence offered in the above entitled cause, comes the defendant by Kramer, Kramer & Campbell, its attorneys, and moves the Court to exclude from the jury all of the evidence offered in the above entitled cause, and to instruct the jury to return a verdict in favor of the defendant herein, and presents herewith a written instruction in that behalf.

KRAMER, KRAMER & CAMPBELL,
Attorneys for Defendant.

The Court instructs the jury to find for the defendant in this cause and to return the following verdict:

"We, the jury, find the defendant not guilty."

Refused.

But the Court denied the said motion and refused to give the said instruction to the jury. To which action and decision of the Court in denying the said motion and refusing to give the said instruction to the jury the defendant by its counsel, then and there excepted.

And thereupon the Court gave to the jury at the instance and request of the plaintiff the following instructions, to-wit:

1. The Statute provides that every railroad corporation in this State shall furnish, start and run cars for the transportation of such passengers and property as shall within a reasonable time
295 previous thereto be ready and be offered for transportation at the several stations on its railroads and at the junctions of other railroads, and at such other stopping places as may be established for receiving and discharging way-passengers and freights. Under this statute the railroad company may establish a

switch at a coal mine as a place for receiving freight, to be loaded on its cars, and when the railroad company has so established a switch as a place for receiving freight, then it is bound by the selection of the place it has established for that purpose.

(Given.)

2.

The court instructs the jury that if you believe from the preponderance of the evidence that the plaintiff, when in need of cars for shipping coal, ordered them from the defendant railroad company on the day previous to the day when they were to be loaded and so ordered them under the instructions of the defendant's agent at Freeburg; and if you further believe from the preponderance of the evidence that all business transactions between the plaintiff and defendant were conducted on the part of the defendant by said agent; then, for the purpose of this suit, the time between the ordering of the cars by the plaintiff and the day they were to be loaded was in every instance a reasonable time to allow the defendant railroad company to deliver to the plaintiff the cars so by it ordered.

(Given.)

296 3.

The court instructs the jury that it is the duty of the defendant railroad company to provide reasonably sufficient facilities for the transportation of goods such as coal.

The company must furnish cars sufficient to transport goods offered in the usual and ordinary course of business on reasonable previous notice being given to the company of the demand for cars, and reasonable time given the company after such notice has been received by it; and a failure of the company to furnish such cars makes it liable to the shipper, if he has been damaged on account of such failure to furnish cars, if there was any failure.

(Given.)

4.

The court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff has proved the allegations in his declaration, and that the defendant has failed to establish a sufficient defense to the action, then the plaintiff should recover.

(Given.)

To the giving of each and all of which instructions the defendant by its counsel then and there excepted.

And thereupon the court gave to the jury at the instance and request of the defendant the following instructions to-wit:

297 1.

The court instructs the jury that the plaintiff has alleged in its declaration that it had at its said mine the coal ready for shipment when it gave its respective notices to the defendant for coal cars to be delivered at its said mine. The court instructs you that unless

you believe from the evidence in this case that at the time it made said demand it did have ready for shipment the coal to load the cars which it demanded then you should find for the defendant.
(Given.)

2.

The court instructs the jury that the statutes of the State of Illinois require railroad corporations in this State to furnish, start and run cars for the transportation of such passengers and property as shall within a reasonable time previous thereto be ready or be offered for transportation at the several stations of the railroads, or at the junction of railroads, and at such other stopping places as may be established by the railroad for the receiving and discharging of passengers and freight; and that the railroad company shall take, receive, transport and discharge passengers and property at, from and to such stations, junctions and places upon the due payment or tender of payment of freight or fare legally authorized therefor, if payment shall be demanded. The Court further instructs you that no other or greater duty devolves upon railroad companies to receive and transport freight than mentioned in the statute.
(Given.)

298

3.

The court instructs the jury that if you believe from the evidence in this case that the defendant, Illinois Central Railroad Company during the time involved in this suit, distributed all of the available equipment it had for hauling coal among the operators of coal mines which were located and operated on its lines and that such distribution was made according to the capacity of said mines so located and operated on its said lines, and that to have furnished the cars to the plaintiff on the demands made by the plaintiff as shown by the evidence in this suit the defendant would have been compelled to discriminate against other operators of coal mines located on its lines in furnishing cars to them or some of them, then the plaintiff cannot recover in this case.
(Given.)

4.

The court instructs the jury that it is the duty of a railroad company engaged in furnishing cars to coal mines located on its lines during times when there is a shortage of coal cars; that is, during a time when it is unable to furnish all of the operators of coal mines located on its lines with all of the coal cars desired and demanded by them—to distribute all of the coal hauling equipment that it has available or can secure for distribution, fairly and equitably among the operators of such coal mines located on the lines of such railroad according to and in proportion to the capacity of the said coal mines so located on its lines to mine and produce coal.

299 And if you believe from the evidence in this case that during the time involved in this suit the defendant Illinois Central Railroad Company did not have a sufficient amount of coal hauling equipment and cars to furnish all of the operators of coal

mines located on its lines with all the cars desired and demanded by them and which they were ready and willing to load with coal if said cars had been furnished as so demanded, and that it did, during said time, distribute all of the coal hauling equipment and cars that it had available or could secure for distribution, fairly and equitably among the operators of said coal mines so located on its said lines according to and in proportion to the capacity of said coal mines to mine and produce coal, then and in such case the defendant discharged its whole duty with reference to furnishing such cars and in such case the defendant would not be liable in this suit.

(Given.)

To the giving of each and all of which instructions the plaintiff by its counsel then and there excepted.

And the court of its own motion gave to the jury the following instructions as to the form of the verdict:

The court instructs the jury that if you find the defendant guilty the form of your verdict may be:

"We, the jury, find the defendant guilty and assess plaintiff's damages at — dollars." (Here insert amount.)

300 If you find the defendant not guilty the form of your verdict may be:

"We, the jury, find the defendant not guilty."

(Given.)

To the giving of such instruction the defendant, by its counsel, then and there excepted—

And thereupon the court gave to the jury, at the instance and request of the defendant, the following interrogatory, to-wit:

Does the evidence in this case show that the defendant Illinois Central Railroad Company, during the time involved in this suit, distributed all the cars it had available for hauling coal, among the operators of coal mines located on its lines of railroad according to the capacity of the mine so located on its lines?

(Submitted.)

And thereupon the jury returned the following verdict, to-wit:

We, the jury, find the defendant guilty, and assess the plaintiff's damages at One Thousand ($1,000) Dollars.

1. ARTHUR H. KANZLER.
2. T. J. PRICE.
3. LOUIS C. REINHARDT.
4. ADAM STOCK.
5. MIKE MULLIN.
6. HERMAN MARIT.
7. MARTIN GERMANN.
8. EDGAR APPEL.
9. CLEMENT REEVES.
10. THEODORE D. GARBE.
11. JOE MOUR.
12. GEORGE RIESS.

And thereupon the jury returned the following answer to the said special interrogatory submitted to them:

Answer to the above interrogatory is No.

301 (Signed)

1. ARTHUR KANZLER.
2. MARTIN GERMANN.
3. GEORGE RIESS.
4. HERMAN MARIT.
5. JOE MOUR.
6. ADGAR APPEL.
7. MIKE MULLIN.
8. THEODORE D. GARBEL.
9. LOUIS C. REINHARDT.
10. ADAM STOCK.
11. T. J. PRICE.
12. CLEMENT REEVES.

And thereupon the defendant moved the court to set aside said verdict of the jury returned herein and to set aside the special finding of the jury herein, and grant a new trial, which said motion as in words and figures as follows, to-wit:

STATE OF ILLINOIS,
County of St. Clair, ss:

In the Circuit Court, April Term, A. D. 1912.

Case —.

MULBERRY HILL COAL COMPANY
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

And now comes the defendant, Illinois Central Railroad Company, Kramer, Kramer & Campbell, its Attorneys, and moves the court to set aside the verdict of the jury returned herein in the above entitled cause and to set aside the special finding of the jury herein, and to grant unto the defendant a new trial and for reasons for said motion defendant shows:

First. Because this court is without jurisdiction to hear this cause.

Second. Because the court erred in admitting improper, incompetent, irrelevant and immaterial evidence offered on the part of the plaintiff over the objections of the defendant.

302 Third. Because the court erred in refusing to admit proper, competent and relevant and material evidence offered on behalf of the defendant.

Fourth. Because the court erred in overruling defendant's motion offered at the close of all the evidence in this case to dismiss suit for want of jurisdiction.

Fifth. Because the court erred in overruling defendant's motion

offered at the close of all the evidence in this case for the court to exclude from the jury all the evidence in this case and to instruct the jury to return a verdict in favor of the defendant said motion being based upon the grounds that the statute of the State of Illinois upon which this suit is based is unconstitutional as to this defendant: in relation to the matters involved in this suit and because the court refused to give said instruction.

Sixth. Because the court erred in refusing to grant defendant's motion offered at the close of all the evidence to exclude the evidence from the jury in this case and to instruct the jury to return a verdict in favor of the defendant and because the court refused to give said instruction.

Seventh. Because the special finding of the jury is not supported by evidence in this case.

Eighth. Because the special finding of the jury is against the evidence in this case.

Ninth. Because the court erred in giving to the jury each and every instruction given to the jury on behalf of the plaintiff.

Tenth. Because the verdict of the jury is contrary to the evidence in this cease.

303 Eleventh. Because the verdict of the jury is contrary to the law in this case.

Twelfth. Because the verdict of the jury is contrary to the law and the evidence in this case.

Thirteenth. Because the verdict of the jury is excessive and for a greater amount than is warranted by the law and evidence in this case.

Fourteenth. And for other good and sufficient reasons.

(Signed) KRAMER, KRAMER & CAMPBELL,
Attorneys for Defendant.

But the Court refused to set aside said verdict and refused to set aside special finding of the jury, and refused to grant a new trial of this cause.

To which decision and action of the court in refusing to set aside said verdict and in refusing to set aside said special finding and to grant a new trial, the defendant by its counsel then and there excepted.

Plaintiff by its attorneys enters a remittiter of $283.08 and judgment is entered on verdict in favor of the plaintiff and against defendant in the sum of $716.92 and costs to which action of the Court in rendering judgment on the verdict the defendant by its counsel then and there excepted.

And for as much as the matters above set forth do not fully appear of record, the defendant tenders this, its Bill of Exceptions, and prays that the same may be signed and sealed by the judge of this court pursuant to the statute in such case made; which is done accordingly this 10th day of June, A. D. 1912.

(Signed) L. BERNREUTER, [SEAL.]
Circuit Judge.

Presented this 10th day of June, A. D. 1912.

L. BERNREUTER, *Judge.*
MILLER-WINKLEMANN & COLE,
Attorneys for Plaintiff.

Filed June 10th, 1912. Smith Myers, Circuit Clerk, St. Clair County, Illinois.

304 Be it remembered that the following is a true and correct copy of the Appeal Bond filed in the above entitled cause.

Know all men by these presents:

That we Illinois Central Railroad Company, John G. Drennan and Edw. C. Kramer of the County of — and State of Illinois, are held and firmly bound unto Mulberry Hill Coal Company in the penal sum of Fifteen Hundred Dollars for the payment of which, well and truly to be made, we and each of us, bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated at — this 20th day of May in the year of our Lord one thousand nine hundred and twelve.

The condition of the above obligation is such, That whereas the said Mulberry Hill Coal Company did on the 3rd day of May one thousand nine hundred and twelve at a term of the Circuit Court then being holden within and for the Third Judicial Circuit in the County of St. Clair and State of Illinois, obtain a judgment against the above bounden Illinois Central Railroad Company for the sum of Seven Hundred Sixteen (716) Dollars and Ninety-two (92) cents and costs of suit from which judgment the said Illinois Central Railroad Company has prayed for and obtained an appeal to the Supreme Court of said State.

Now, if the said Illinois Central Railroad Company shall duly prosecute said appeal, and shall moreover pay the amount of said judgment, costs, interests and damages, rendered and to be rendered against it the said Illinois Central Railroad Company in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be null and void, otherwise to remain in full force and virtue.

ILLINOIS CENTRAL R. R. CO. [SEAL.]
W. L. PARK, *Vice-Pres't.*

Attest:

BURT A. BECK, *Ass't Sec'y.*

JOHN G. DRENNAN, *Surety.* [SEAL.]
EDW. C. KRAMER. [SEAL.]

Approved by me this 23 day of May, A. D. 1912.

SMITH MYERS, *Clerk.*

(On the back of which appears the following:)

305 STATE OF ILLINOIS,
Cook County, ss:

In the Circuit Court.

MULBERRY HILL COAL COMPANY,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

I, the undersigned, do solemly swear that I am the owner in fee simple of Real Estate in the County of Cook, and State of Illinois, and that said Real Estate is of the value of Fifty Thousand Dollars, after deducting all incumbrances of any nature or kind, which now are to my knowledge a lien thereon. No incumbrance on same.

JOHN G. DRENNAN, *Surety.*

Subscribed and sworn to before me this 21 day of May A. D. 1912.
[SEAL.] M. J. O'CONNELL,
Notary Public.

Filed this twenty-first day of May, A. D. 1912. Smith Myers, Clerk.

306 Be it remembered that the following is a true and correct copy of Præcipe for record in the above entitled cause:

In the Circuit Court, to the April Term, A. D. 1912.

STATE OF ILLINOIS,
County of St. Clair, ss:

MULBERRY HILL COAL COMPANY
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

Case.

The Clerk of said Court will please make a transcript of the record in the above entitled cause as follows:

1st. Convening order of the St. Clair County Circuit Court, September term A. D. 1908.

2nd. Præcipe for summons.

3rd. Summons.

4th. The Sheriff's return of service of summons.

5th. Orders of the St. Clair County Circuit Court, September Term 1908.

6th. Convening order of the St. Clair County Circuit Court, January Term, 1909.

7th. Orders of St. Clair County Circuit Court, January Term, 1909.

8th. Convening order of the St. Clair County Circuit Court, April Term 1909.

9th. Orders of the St. Clair County Circuit Court, April Term 1909.

10th. Convening order of the St. Clair County Circuit Court, September term, 1909.

11th. Orders of the St. Clair County Circuit Court September term, 1909.

12th. Convening order of the St. Clair County Circuit Court, January term, 1910.

13th. Orders of the St. Clair County Circuit Court January term, 1910.

307 14th. Convening order of the St. Clair County Circuit Court, April term 1910.

15th. Fifth amended declaration and plea of general issue filed thereto.

16th. Orders of the St. Clair County Circuit Court, April term 1910.

17th. Convening order of the St. Clair County Circuit Court, January term 1912.

18th. Remanding order from the Appellate Court, Fourth District of Illinois to the St. Clair County Circuit Court.

19th. Orders of the St. Clair County Circuit Court, January term 1912.

20th. Convening order of the St. Clair County Circuit Court, April term, 1912.

21st. Orders of the St. Clair County Circuit Court, April term, 1912.

22nd. Bill of exceptions.

23rd. Appeal bond.

24th. Copy of this præcipe.

25th. Certificate of Clerk.

KRAMER, KRAMER & CAMPBELL,
Attorneys for Defendant.

To Winklemann & Ogle and James O. Miller, attorneys for Plaintiff in the above entitled cause:

You are hereby notified that the defendant will appear at Belleville in the office of the Clerk of the Circuit Court of St. Clair County, Illinois on Monday, July 22d A. D. 1912, at the hour of ten o'clock A. M. and will file its præcipe for record in the above entitled cause, a copy of which is hereto attached, at which time and place you may be present if you so desire and object to said præcipe to be filed by said defendant, or file an additional præcipe requesting the Clerk of said Court to certify such additional parts of the record as you

308 shall deem necessary or desirable.

Dated this the 16th day of July A. D. 1912.

KRAMER, KRAMER & CAMPBELL,
Attorneys for Defendant.

Received copy of the above and foregoing this — day of July A. D. 1912.

WINKLEMANN & OGLE,
Attorneys for Plaintiff.

Filed July 18, 1912. Smith Myers, Circuit Clerk, St. Clair Co., Ills.

309 STATE OF ILLINOIS,
St. Clair County, ss:

Smith Myers, Clerk of the Circuit Court of St. Clair County, in the State aforesaid, do hereby certify the above and foregoing to be a true and correct copy of the Præcipe for Summons; Summons and Return thereon; Order of Court Sept. Term 1908; Adjourning Order of Court, Sept. 1908; Convening Order of Court Jan'y 1909; Order of Court Jan'y 1909; Adj. Order Jan'y Term 1909; Convening Order April Term 1909; Order of Court, Apr. Term 1909; Adj. Order Apr. Term 1909; Conv. Order Sept. Term 1909; Order of Court Sept. Term 1909; Adj. Order Sept. — 1909; Conv. Order Jan'y Term 1910; Order of Court Jan'y Term 1910; Adj. Order Jan'y Term 1910; Conv. Order Apr. Term 1910; Fifth Amended Declaration; Plea for General Issue; Order of Court Apr. Term 1910; Adj. Order April Term 1910; Conv. Order Jan'y Term 1912; Remanding Order for Appellate Court; Adj. Order Jan'y Term 1912; Conv. — Apr. Term 1912; Order of Court, April Term 1912; Bill of Exceptions; Appeal Bond and Præcipe for Record, being a complete Record, as above set forth, in a certain cause lately pending in said Court, on the Law side thereof, wherein Mulberry Hill Coal Company is Plaintiff, and Illinois Central Railroad Company is Defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Belleville, this 29th day of July, A. D. 1912.

SMITH MYERS,
Circuit Clerk.
J. M. J. McLEAN, *Deputy.*

310 In the Supreme Court of the State of Illinois, October Term, A. D. 1912.

MULBERRY HILL COAL COMPANY, Appellee,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Appeal from the Circuit Court of St. Clair County, Illinois.

Assignment of Errors.

And now comes the appellant, Illinois Central Railroad Company by John G. Drennan and Kramer, Kramer & Campbell, its attorneys, and says that in the proceeding aforesaid there is manifest error in this, to-wit:

1st. The Circuit Court erred in admitting improper, incompetent, immaterial and irrelevant testimony offered on the trial of this cause by appellee over the objections of appellant.

2nd. The Circuit Court erred in refusing to admit proper, compe-

tent, material and relevant testimony offered on the trial of this cause by appellant.

3rd. The Circuit Court erred in overruling appellant's motion offered at the close of all the evidence to dismiss this suit for want of jurisdiction.

4th. The Circuit Court erred in overruling appellant's motion offered at the close of all the evidence in this case for the Court to exclude from the jury all the evidence in this case and to instruct the jury to return a verdict in favor of appellant, said motion being based upon the grounds that the statute of the State of Illi-
311 nois, upon which this suit is based, is unconstitutional as to this appellant in relation to the matters involved in this suit, and because the Court refused to give said instruction.

5th. The Circuit Court erred in refusing to grant applicant's motion offered at the close of all the evidence to exclude the evidence from the jury in this case, and to instruct the jury to return a verdict in favor of appellant, and because the Court refused to give said instruction.

6th. The Circuit Court erred in giving to the jury the first, second, third and fourth instructions and each of them offered by appellee.

7th. The Circuit Court erred in overruling appellant's motion to set aside the verdict of the jury returned in this case, and to set aside the special finding of the jury in said case, and to grant unto appellant a new trial for the reasons therein stated.

8th. The Circuit Court erred in rendering judgment on the verdict in this case.

9th. For other good and sufficient reasons.

Wherefore, appellant, Illinois Central Railroad Company prays that judgment may be reversed annulled and held for nothing, and that it may be restored to all things that it has lost by reason thereof.

JOHN G. DRENNAN,
KRAMER, KRAMER & CAMPBELL,
Attorneys for Appellant.

312 And afterwards, to-wit, on the 22nd day of October, A. D. 1912, the same being one of the days of the term of Court aforesaid the following proceedings were had in said Court and entered of record in words and figures following, to-wit:

8527.

MULBERRY HILL COAL COMPANY, Appellee,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Appeal Circuit Court St. Clair.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that Appellant, hath filed herein

a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

313 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield, on Tuesday, the Third Day of December, in the Year of Our Lord One Thousand Nine Hundred and Twelve, within and for the State of Illinois.

Present:

The Honorable Frank K. Dunn, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable William M. Farmer, Justice.
Honorable Orron N. Carter, Justice.
Honorable John P. Hand, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable George A. Cooke, Justice.
William H. Stead, Attorney General.
Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk.*

Be it remembered, that afterward, to-wit: on the 17th day of December, 1912, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

No. 8527.

MULBERRY HILL COAL COMPANY, Appellee,
v.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Appeal from Circuit Court St. Clair.

314 MULBERRY HILL COAL COMPANY, Appellee,
v.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Appeal from Circuit Court, St. Clair County.

Docket No. 8527; Agenda No. 113; October, 1912.

CARTWRIGHT, *J.*:

This is an action on the case brought by the Mulberry Hill Coal Company, appellee, against Illinois Central Railroad Company, appellant, to recover damages on account of the failure of appellant to furnish cars at the coal mine of appellee within a reasonable time after the same were required for the transportation of coal. At the trial before the court and a jury the appellant, at the close of all the evidence, moved the court to dismiss the suit on the ground that Section 22 of the act in relation to fencing and operating railroads, requiring railroad corporations to furnish cars within a reasonable time for the transportation of property offered for such transportation, is null and void because it is repugnant to the commerce clause of the constitution of the United States. The court denied the motion, and after the verdict rendered judgment for $716.92, the amount of money lost by the appellee in consequence of the failure of appellant to comply with the statute. An appeal was taken to this court on the ground that the validity of the statute is involved.

That part of Section 22 in question is as follows: "Every railroad corporation in the State shall furnish, start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads and at the junctions of other railroads, and at such stopping places as may be
315 established for receiving and discharging way-passengers and freights." It was proved at the trial that the railroad of the appellant extends through a number of states and that it is engaged in commerce between them, and therefore it is contended that the statute, as applied in this case, is a burden upon interstate commerce. Congress has exclusive control over interstate commerce and respecting that subject its authority is paramount, but we are not able to discover that this statute either regulates interstate commerce or its instrumentalities or burdens such commerce in any way. The only requirement of the statute, as applied in this case or any other case, is that the railroad corporation shall furnish cars

within a reasonable time after they are required, to transport the property offered for transportation and what would be a reasonable time in any case would depend upon all the circumstances and conditions existing, including the requirements of the interstate commerce carried on by the corporation. Congress has exclusive jurisdiction over interstate commerce, but we do not understand that a railroad corporation created by a state may by engaging in interstate commerce, emancipate itself from all control by the state and that thereafter the state granting the franchise and endowing the corporation with all its powers will have no authority to require the performance of the undoubted duty of carrying property offered for transportation, where the requirement does not impose any burden upon interstate commerce or disable the corporation in any way from carrying on such commerce. If that were so the state would be powerless to prevent a railroad corporation from running its trains through the state without making any provision for local transportation or the discharge of any duty as a common carrier within the state. The cases cited and relied upon by appel-
316 lant do not sustain such a doctrine. In Houston & Texas Central Railroad Co. v. Mayes, 201 U. S. 221, cars were demanded for an interstate shipment, and the statute penalized the railroad company in the sum of $25 per day for each car for a failure to furnish cars within a certain number of days after a requisition for the same. The railroad company must furnish cars on the particular day named or incur the penalty. The requirement was peremptory, except in case of strikes or public calamities, regardless of all duties arising in interstate commerce, and manifestly that was an attempt by the state to interfere with interstate commerce. In St. Louis & Southern Railroad Co. v. Arkansas, 217 U. S. 136, the railroad commission of the state of Arkansas promulgated a rule by which a railroad company must furnish cars within five days after a written application therefor by a shipper. The state sued to recover penalties amounting to $1950, and the Supreme Court of the United States said that the ruling of the court below necessarily involved an assertion of power by the state to absolutely forbid the *effacious* carrying on of interstate commerce. The demands of the shipper in the state of Arkansas were to be complied with regardless of all other circumstances, and the rule amounted to prohibiting or unlawfully hindering the right to carry on interstate commerce. The section here in question does nothing of the kind, but only requires a railroad corporation to furnish cars within a reasonable time, in view of all the circumstances and conditions, for carrying the products of the citizens to market. The court did not err in denying the motion.

It is argued that the coal mine was not within the provisions of the statute because it was a mile and a half from the regular station of Freeburg. The railroad ran by the mine and the com-
317 pany had constructed a switch for loading coal. As it had established that place for receiving freight it came within the statute. The appellee had the coal in its mine, the miners to mine and load it, and the facilities and machinery for that purpose,

and it was not essential, in order to hold the appellant liable, that it should have brought the coal to the surface and put it in position to dump into cars, which would have largely increased the damage suffered from the failure to obtain the cars.

The judgment is affirmed.

318 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday, the Third Day of December, in the Year of Our Lord One Thousand Nine Hundred and Twelve, within and for the State of Illinois.

Present:

The Honorable Frank K. Dunn, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable John P. Hand, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable George A. Cooke, Justice.
William H. Stead, Attorney General.
Warren C. Murray, Marshal.

Attest:
J. McCAN DAVIS, *Clerk.*

Be it remembered, that to-wit:—on the 17th day of December, A. D. 1912, the same being one of the days of the said December term of said Supreme Court, certain proceedings were had in said court and entered of record in the words and figures following; to-wit:

No. 8527.

MULBERRY HILL COAL COMPANY, Appellee,
v.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Appeal from Circuit Court of St. Clair County.

DECEMBER 17TH, A. D. 1912.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error:

Therefore, it is considered by the Court that the Judgment of the Circuit Court aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant costs by it in this behalf expended, to be taxed, and that it have execution therefor.

319 *Authentication of Record.*

SUPREME COURT,
State of Illinois, ss:

I, J. McCan Davis, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The Mulberry Hill Coal Company, Appellee, vs. The Illinois Central Railroad Company, Appellant, and also of the opinion of the court rendered therein as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, in said State, this 14th day of February A. D. 1913.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court.

320 Filed Jan. 29, 1913. J. McCan Davis, Clerk of Supreme Court.

In the Supreme Court of Illinois.

No. 8527.

MULBERRY HILL COAL COMPANY, Appellee,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Præcipe for Transcript of Record on Writ of Error to the Supreme Court of the United States.

The Clerk of said Court will please make a transcript of the record in the above entitled cause and attach thereto certain files, in the following manner:

1st. A copy of all orders of the Supreme Court of the State of Illinois in relation to said cause.

2d. A copy of the transcript of the record filed in said cause from the Circuit Court of St. Clair County, Illinois, with all endorsements thereon.

3d. A copy of the opinion of the Supreme Court of the State of Illinois in said cause.

4th. A copy of the Bond on writ of error filed in said cause with all endorsements thereon.

5th. The Clerk's certificate to said transcript.

6th. The original petition filed for writ of error together with its allowance by the Chief Justice of the Supreme Court of the State of Illinois.

7th. The original assignment of errors filed in said cause.

8th. The original writ of error, with all endorsements thereon.

9th. A statement showing that a copy of the petition for writ of error, a copy of assignment of errors and a copy of the writ of error have been lodged with the Clerk of the Supreme Court of Illinois.

10th. The original citation, with service.

321 11th. The return to the writ of error and statement of costs.

EDW. C. KRAMER,
W. S. HORTON,
JOHN G. DRENNAN,
KRAMER, KRAMER & CAMPBELL,
Attorneys for Illinois Central Railroad Company.

Filed Jan. 29, 1913. J. McCan Davis, Clerk of Supreme Court.

322 In the Supreme Court of Illinois.

No. 8527.

MULBERRY HILL COAL COMPANY, Appellee,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

STATE OF ILLINOIS,
County of St. Clair, ss:

Edward C. Kramer, after being first duly sworn on his oath doth depose and say that he is one of the attorneys for the Illinois Central Railroad Company, wherein it has sued out a writ of error to the Supreme Court of the United States in the above entitled cause.

Affiant further states that he did, on the 30th day of January, A. D. 1912, mail to William Winklemann, Albert B. Ogle and James O. Miller, attorneys for said Mulberry Hill Coal Company, addressed to their post office address at Belleville, Illinois, a copy of the præcipe for the transcript of the record in this case filed with the Clerk of the Supreme Court of the State of Illinois.

EDWARD C. KRAMER.

Subscribed and sworn to before me this 30th day of January, A. D. 1913.

[Seal Nina Compton, Notary Public, St. Clair County, Illinois.]

NINA COMPTON,
Notary Public.

[Endorsed:] Filed Jan. 31, 1913. J. McCan Davis, Clerk of Supreme Court.

323 Be it remembered, to-wit, that on the 20th day of January, A. D. 1913, there was duly filed by the appellant, the Illinois Central Railroad Company, in the office of the Clerk of the Supreme Court of Illinois, a petition for writ of error with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois addressed to the Hon. Frank K. Dunn, Chief Justice of the Supreme Court of Illinois with the original order by the said Chief Justice upon the said petition allowing said writ of error, which documents are in words and figures as follows, to-wit:

324 UNITED STATES OF AMERICA,
State of Illinois, ss:

Supreme Court of Illinois.

No. 8527.

MULBERRY HILL COAL COMPANY, Appellee,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

To the Honorable Chief Justice of the Supreme Court of the State of Illinois:

Your petitioner, the Illinois Central Railroad Company, respectfully shows that on the 17th day of December, A. D. 1912 the Supreme Court of the State of Illinois rendered a final judgment against your petitioner in a certain cause wherein the Mulberry Hill Coal Company, was appellee (plaintiff in said suit) and your petitioner was appellant, (defendant in said suit) for $716.92, and costs, as will appear by reference to the record and proceedings in said cause, and that said Court is the highest Court of the State in which a decision in said suit could be had; and your petitioner claims the right to remove said judgment to the Supreme Court of the United States by a Writ of Error under and by virtue of the provisions of the law of the United States for reasons as appear by the record of the proceedings in said cause and the assignment of errors which is herewith submitted.

Wherefore, your petitioner prays the allowance of a Writ of Error returnable into the Supreme Court of the United States, and for a citation and an order fixing the amount of a supersedeas bond.

And your petitioner will every pray, etc.

325 ILLINOIS CENTRAL RAILROAD COMPANY, *Petitioner.*
EDW. C. KRAMER,
W. S. HORTON,
JOHN G. DRENNAN,
KRAMER, KRAMER & CAMPBELL,
Attorneys for Petitioner.

Let the Writ of Error issue as prayed, amount of bond fixed at Two Thousand Dollars ($2000.00).

Dated this 10th day of January, A. D. 1913.

FRANK K. DUNN,
Chief Justice of the Supreme Court of the State of Illinois.

[Endored:] Filed Jan. 20, 1913. J. McCan Davis, Clerk of the Supreme Court.

326 *Assignment of Errors.*

In the Supreme Court of Illinois.

No. 8527.

MULBERRY HILL COAL COMPANY, Appellee,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Now comes the said Illinois Central Railroad Company and in connection with its petition for a writ of error filed herein, respectfully submits that on the trial of this cause and in the decision of the Supreme Court of the State of Illinois herein, there was drawn in question the validity of a statute of the State of Illinois on the grounds of its being repugnant to the constitution of the United States, and the decision of the Supreme Court of the State of Illinois was in favor of the validity of such statute of the State of Illinois; and, on the trial of said cause and in the decision of the Supreme Court of the State of Illinois, there was drawn in question the validity of a statute of the State of Illinois on the grounds of its being repugnant to the laws of the United States, and the decision of the Supreme Court of the State of Illinois was in favor of the validity of such statute of the State of Illinois; and, on the trial of said cause and in the decision of the Supreme Court of the State of Illinois, there was drawn in question authority exercised under the State of Illinois on the ground of its being repugnant to and against the laws of the United States, and the decision of the Supreme Court of the State of Illinois was in favor of the validity of such authority; and, on the trial of said cause and in the decision of the
327 Supreme Court of the State of Illinois, there was especially set up and claimed by the said Illinois Central Railroad Company a right and immunity under the constitution and laws of the United States, and the decision of the Supreme Court of the State of Illinois was against said right and immunity; and that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Illinois, in the above entitled cause, there are manifest errors which operated to the prejudice of the said Illinois Central Railroad Company, in this, to-wit:

1st. The Supreme Court of the State of Illinois erred in affirming the judgment of the trial Court in said cause.

2d. The Supreme Court of the State of Illinois erred in holding that the provisions of Section 22 of an Act of the General Assembly of the State of Illinois entitled, "An Act in relation to Fencing and Operating Railroads," approved March 31, 1874, in force July 1, 1874, as amended by Act approved June 25, 1883, in force July 1, 1883, which said Section is in words and figures as follows, to-wit:

"84. Must Furnish Cars and Transport Passengers and Property—When.) 22. Every railroad corporation in the State shall furnish, start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging way-passengers and freights; and shall take, receive, transport and discharge such passengers and property at, from and to such stations, junctions and places, on and from all trains advertised to stop at the same for passengers and freight, respectively, upon the due payment, or tender of payment of tolls, freight or fare legally authorized therefor, if payment shall be demanded, and such railroad companies shall at all junctions with other railroads, and at all depots where said railroad companies stop their trains regularly to receive and discharge passengers in cities and villages, for at least one-half hour before the arrival of, and one-half hour after the arrival of any passenger train, cause their respective depots to be open for the reception of passengers; said depots to be kept well lighted and warmed for the space of time aforesaid. (As amended by act approved June 25, 1883. In force July 1, 1883,"

are not in violation of and not repugnant to Section 8 of
328 Article 1 of the Constitution of the United States, which confers on Congress the exclusive power to regulate commerce among the several states, when applied to the facts in this case.

3d. The Supreme Court of the State of Illinois erred in holding that the trial Court had jurisdiction of the subject matter involved in this suit and in refusing to hold that the Interstate Commerce Commission of the United States, under the laws of the United States, had exclusive jurisdiction of said matter.

4th. The Supreme Court of the State of Illinois erred in refusing to hold that the trial Court erred in overruling motion of the said Illinois Central Railroad Company submitted at the close of all the evidence in this case to dismiss said case for want of jurisdiction, which said motion was based upon the grounds that the trial Court did not have jurisdiction of said matter and that the exclusive jurisdiction thereof was in the Interstate Commerce Commission, under the laws of the United States.

5th. The Supreme Court of the State of Illinois erred in refusing to hold that the trial Court erred in refusing to grant motion of the Illinois Central Railroad Company submitted at the close of all the evidence to exclude from the jury all the evidence in this case and to instruct the jury to return a verdict in favor of said Illinois Central Railroad Company, said motion being based upon the ground that the statute of the State of Illinois upon which this suit

is based is in violation of and repugnant to Section 8 of Article 1 of the constitution of the United States, as to and in relation to the matters involved in this suit.

Wherefore, the said Illinois Central Railroad Company prays that the said judgment and decision of the Supreme Court of Illinois may be reversed, annulled and altogether held for naught,
329 and that it may be restored to all things which it has lost by the said action and because of the said judgment and decision.

EDW. C. KRAMER,
W. S. HORTON,
JOHN G. DRENNAN,
KRAMER, KRAMER,
& CAMPBELL,
Attorneys for Illinois Central Railroad Company.

[Endorsed:] Filed Jan. 20, 1913. J. McCan Davis, Clerk of Supreme Court.

330 Be it remembered that on the 20th day of January, A. D. 1912, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by the Illinois Central Railroad Company an original bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois, in words and figures as follows, to-wit:

331 *Bond.*

Know all men by these presents, That we, the Illinois Central Railroad Company, as principal, and John G. Drennan as Sureties are held and firmly bound unto the Mulberry Hill Coal Company in the penal sum of Two Thousand Dollars ($2000.00) lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly, severally and firmly by these presents.

Witness our hands and seals this 6th day of January, A. D. 1913;

The condition of the above obligation is such, that:

Whereas, the above bounden Illinois Central Railroad Company seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Illinois.

Now, therefore, if the above named Illinois Central Railroad Company shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect.

ILLINOIS CENTRAL RAILROAD COMPANY,
By C. H. MARKHAM,
President. [SEAL.]

[SEAL.] JOHN G. DRENNAN. [SEAL.]

Attest:
BURT A. BECK,
Ass't Sec'y.

STATE OF ILLINOIS,
County of Cook, ss:

John G. Drennan on oath says that he is 58 years of age, resides in Chicago, Cook county, Illinois, and owns unincumbered real estate in the Counties of Cook and Christian in the State of Illinois worth more than $50,000.00 and that he is worth more than $50,000.00 over and above all his debts and exemptions and that he signed the foregoing bond of his own free will as surety as expressed therein.

JOHN G. DRENNAN.

Subscribed and sworn to before me this sixth day of January, A. D. 1913.

M. J. CONNELL,
[SEAL.] *Notary Public.*

Bond approved and to act as supersedeas.

FRANK K. DUNN,
Chief Justice of the Supreme Court of Illinois.

Filed Jan. 20, 1913. J. McCan Davis, Clerk of Supreme Court. (Office of the Clerk, Received Jan. 16, 1913, Supreme Court U. S.)

[Endorsed:] Filed Jan. 29, 1913. J. McCan Davis, Clerk of Supreme Court.

332 UNITED STATES OF AMERICA, STATE OF ILLINOIS,
Office of the Clerk of the Supreme Court of Illinois, ss:

Be it remembered, that on the 20th day of January, A. D. 1913, there was duly filed in the office of the Clerk of the Supreme Court of Illinois, an original writ of error, which is hereby attached and is in words and figures as follows, to-wit:

333 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Illinois before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Mulberry Hill Coal Company and Illinois Central Railroad Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was

drawn in question the construction of a clause of the Con-
333½ stitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Illinois Central Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 20th day of January, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the District Court of the United States, Southern District of Illinois.]

R. C. BROWN,
Clerk of the District Court of the United States for the Southern District of Illinois.

Allowed by
FRANK K. DUNN,
Chief Justice of the Supreme Court of the State of Illinois.

[Endorsed:] Illinois Central Railroad Company, Plaintiff in Error, v. Mulberry Hill Coal Company, Defendant in Error. Writ of Error. Original. Filed this 20th day of January, A. D. 1913. J. McCan Davis, Clerk of the Supreme Court of the State of Illinois. I hereby certify that two copies of the within writ have been lodged with me as Clerk of the Supreme Court of the State of Illinois, this 20th day of January, A. D. 1913. J. McCan Davis, Clerk of the Supreme Court of the State of Illinois. Filed Jan. 20, 1913. J. McCan Davis, Clerk of Supreme Court.

334 *Certificate of Lodgment.*

SUPREME COURT,
State of Illinois, ss:

I, J. McCan Davis, Clerk of the Supreme Court, do hereby certify that there was lodged with me as such Clerk on the 20th day of January, A. D. 1913, in the matter of The Mulberry Hill Coal Com-

pany, Appellee, vs. Illinois Central Railroad Company, Appellant,

1. The original bond of which a copy is herein set forth.

2. A copy of the writ of error to file in my office and a copy thereof deposited in my office for defendant in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, Ill., this 14th day of February, A. D. 1913.

[Seal of the Supreme Court, State of Illinois.]

J. McCAN DAVIS,
Clerk Supreme Court.

335 And afterwards, to-wit, on the 29th day of January, A. D. 1913, a certain Citation showing service on the Mulberry Hill Coal Company was filed in the office of the Clerk of the Supreme Court in words and figures following, to-wit:

336 UNITED STATES OF AMERICA, *ss:*

To Mulberry Hill Coal Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Illinois, wherein Illinois Central Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frank K. Dunn, Chief Justice of the Supreme Court of the State of Illinois, this twenty-second day of January, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the Supreme Court, State of Illinois, August 23, 1818.]

FRANK K. DUNN,
Chief Justice of the Supreme Court of the State of Illinois.

Attest:

J. McCAN DAVIS,
Clerk of the Supreme Court of the State of Illinois.

Filed Jan. 29, 1913. J. McCan Davis, Clerk Supreme Court.

We, the undersigned attorneys of record for the Mulberry Hill Coal Company, defendant in error in the above entitled cause, did

on this day receive a true and correct copy of this citation, and we do hereby acknowledge service of the same.

Dated this 28th day of January, A. D. 1913.

WM. WINKELMANN,
ALBERT B. OGLE,
JAMES O. MILLER,
Attorneys for the Mulberry Hill Coal Company, Defendant in Error.

337 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Illinois, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Illinois, in the City of Springfield, this 14th day of February, A. D. 1913.

[Seal of the Supreme Court, State of Illinois, August 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

338 985/23560.

In the Supreme Court of the United States.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error,
vs.
MULBERRY HILL COAL COMPANY, Defendant in Error.

Error to the Supreme Court of the State of Illinois.

Stipulation with Reference to Printing Record.

It is agreed by and between the parties hereto that Paragraphs 2 to 99, both inclusive, of the declaration, from pages 29 to 130, both inclusive, of the record, need not be printed, but in lieu thereof the following be printed:

"Second paragraph is same as first, except it refers to 17th and 18th days of January.

Third paragraph is same as first, except it refers to 28th and 29th days of January.

Fourth paragraph is same as first, except it refers to 4th and 5th days of February.

Fifth paragraph is same as first, except it refers to 21st and 22nd days of February.

Sixth paragraph is same as first, except it refers to 22nd and 23rd days of February.

Seventh paragraph is same as first, except it refers to 26th and 27th days of February.

Eighth paragraph is same as first, except it refers to 27th and 28th days of February.

339 Ninth paragraph is same as first, except it refers to 1st and 2nd days of March.

Tenth paragraph is same as first, except it refers to 4th and 5th days of March.

Eleventh paragraph is same as first, except it refers to 6th and 7th days of March.

Twelfth paragraph is same as first, except it refers to 11th and 12th days of March.

Thirteenth paragraph is same as first, except it refers to 12th and 13th days of March.

Fourteenth paragraph is same as first, except it refers to 15th and 16th days of March.

Fifteenth paragraph is same as first, except it refers to 19th and 20th days of March.

Sixteenth paragraph is same as first, except it refers to 22nd and 23rd days of March.

Seventeenth paragraph is same as first, except it refers to 28th and 29th days of March.

Eighteenth paragraph is same as first, except it refers to 29th and 30th days of March.

Nineteenth paragraph is same as first, except it refers to 5th and 6th days of April.

Twentieth paragraph is same as first, except it refers to 8th and 9th days of April.

Twenty-first paragraph is same as first, except it refers to 24th and 25th days of April.

Twenty-second paragraph is same as first, except it refers to 25th and 26th days of April.

Twenty-third paragraph is same as first, except it refers to 29th and 30th days of April.

340 Twenty-fourth paragraph is same as first, except it refers to 2nd and 3rd days of May.

Twenty-fifth paragraph is same as first, except it refers to 6th and 7th days of May.

Twenty-sixth paragraph is same as first, except it refers to 8th and 9th days of May.

Twenty-seventh paragraph is same as first, except it refers to 9th and 10th days of May.

Twenty-eighth paragraph is same as first, except it refers to 13th and 14th day- of May.

Twenty-ninth paragraph is same as first, except it refers to 14th and 15th days of May.

Thirtieth paragraph is same as first, except it refers to 20th and 21st days of May.

Thirty-first paragraph is same as first, except it refers to 21st and 22nd days of May.

Thirty-second paragraph is same as first, except it refers to 23rd and 24th days of May.

Thirty-third paragraph is same as first, except it refers to 28th and 29th days of May.

Thirty-fourth paragraph is same as first, except it refers to 29th and 30th days of May.

Thirty-fifth paragraph is same as first, except it refers to 7th and 8th days of June.

Thirty-sixth paragraph is same as first, except it refers to 10th and 11th days of June.

Thirty-seventh paragraph is same as first, except it refers to 12th and 13th days of June.

Thirty-eighth paragraph is same as first, except it refers to 14th and 15th days of June.

Thirty-ninth paragraph is same as first, except it refers to 15th and 17th days of June.

341 Fortieth paragraph is same as first, except it refers to 21st and 22nd days of June.

Forty-first paragraph is same as first, except it refers to 26th and 27th days of June.

Forty-second paragraph is same as first, except it refers to 27th and 28th days of June.

Forty-third paragraph is same as first, except it refers to 28th and 29th days of June.

Forty-fourth paragraph is same as first, except it refers to 2nd and 3rd days of July.

Forty-fifth paragraph is same as first, except it refers to 5th and 6th days of July.

Forty-sixth paragraph is same as first, except it refers to 9th and 10th days of July.

Forty-seventh paragraph is same as first, except it refers to 26th and 27th days of July.

Forty-eighth paragraph is same as first, except it refers to 5th and 6th days of August.

Forty-ninth paragraph is same as first, except it refers to 7th and 8th days of August.

Fiftieth paragraph is same as first, except it refers to 12th and 13th days of August.

Fifth-first paragraph is same as first, except it refers to the 15th and 16th days of August.

Fifty-second paragraph is same as first, except it refers to 16th and 17th days of August.

Fifty-third paragraph is same as first, except it refers to 17th and 19th days of August.

Fifty-fourth paragraph is same as first, except it refers to 19th and 20th days of August.

Fifty-fifth paragraph is same as first, except it refers to 20th and 21st days of August.

342 Fifth-sixth paragraph is same as first, except it refers to 22nd and 23rd days of August.

Fifty-seventh paragraph is same as first, except it refers to 23rd and 24th days of August.

Fifty-eighth paragraph is same as first, except it refers to 26th and 27th days of August.

Fifth-ninth paragraph is same as first, except it refers to 27th and 28th days of August.

Sixtieth paragraph is same as first, except it refers to 29th and 30th days of August.

Sixty-first paragraph is same as first, except it refers to 30th and 31st days of August.

Sixty-second paragraph is the same as first, except it refers to the 4th and 5th days of September, and alleges an increase in capacity of mine from 200 to 425 tons and the demand for cars increased accordingly and damages sustained to $22.96.

Sixty-third paragraph is same as sixty-second, except it refers to 5th and 6th days of September.

Sixth-fourth paragraph is same as sixty-second, except it refers to 7th and 9th days of September.

Sixty-fifth paragraph is same as sixty-second, except it refers to 10th and 11th days of September.

Sixty-sixth paragraph is same as sixty-second, except it refers to 13th and 14th days of September.

Sixty-seventh paragraph is same as sixty-second, except it refers to 20th and 21st days of September.

Sixty-eighth paragraph is same as sixty-second, except it refers to 23rd and 24th days of September.

Sixty-ninth paragraph is same as sixty-second, except it refers to 26th and 27th days of September.

Seventieth paragraph is same as sixty-second, except it refers to 1st and 2nd days of October.

343 Seventh-first paragraph is same as sixty-second, except it refers to 4th and 5th days of October.

Seventy-second paragraph is same as sixty-second, except it refers to 5th and 7th days of October.

Seventy-third paragraph is same as sixty-second, except it refers to 8th and 9th days of October.

Seventy-fourth paragraph is same as sixty-second, except it refers to 9th and 10th days of October.

Seventy-fifth paragraph is same as sixty-second, except it refers to 14th and 15th days of October.

Seventy-sixth paragraph is same as sixty-second, except it refers to 15th and 16th days of October.

Seventy-seventh paragraph is same as sixty-second, except it refers to 17th and 18th days of October.

Seventy-eighth paragraph is same as sixty-second, except it refers to 21st and 22nd days of October.

Seventy-ninth paragraph is same as sixty-second, except it refers to 23rd and 24th days of October.

Eightieth paragraph is same as sixty-second, except it refers to 25th and 26th days of October.

Eighty-first paragraph is same as sixty-second, except it refers to 28th and 29th days of October.

Eighty-second paragraph is same as sixty-second, except it refers to 30th and 31st days of October.

Eighty-third paragraph is same as sixty-second, except it refers to 1st and 2nd days of November, and alleges that the capacity of the mine has increased from 425 tons to 525 tons per day, and the demand for cars has increased accordingly, and damages claimed are $23.19.

Eighty-fourth paragraph is same as eighty-third, except it refers to 5th and 6th days of November.

344 Eighty-fifth paragraph is same as eighty-third, except it refers to 7th and 8th days of November.

Eighty-sixth paragraph is same as eighty-third, except it refers to 8th and 9th days of November.

Eighty-seventh paragraph is same as eighty-third, except it refers to 12th and 13th days of November.

Eighty-eighth paragraph is same as eighty-third, except it refers to 14th and 15th days of November.

Eighty-ninth paragraph is same as eighty-third, except it refers to 20th and 21st days of November.

Ninetieth paragraph is same as eighty-third, except it refers to 21st and 22nd days of November.

Ninety-first paragraph is same as eighty-third, except it refers to 22nd and 23rd days of November.

Ninety-second paragraph is same as eighty-third, except it refers to 25th and 26th days of November.

Ninety-third paragraph is same as eighty-third, except it refers to 26th and 27th days of November.

Ninety-fourth paragraph is same as eighty-third, except it refers to 5th and 6th days of December.

Ninety-fifth paragraph is same as eighty-third, except it refers to 6th and 7th days of December.

Ninety-sixth paragraph is same as eighty-third, except it refers to 16th and 17th days of December.

Ninety-seventh paragraph is same as eighty-third, except it refers to 17th and 18th days of December.

Ninety-eighth paragraph is same as eighty-third, except it refers to 18th and 19th days of December.

Ninety-ninth paragraph is same as eighty-third, except it refers to 21st and 23rd days of December."

345 In witness whereof, the parties *parties* hereto have executed this agreement this 17th day of February, A. D. 1913.

EDWARD C. KRAMER,
RUDOLPH J. KRAMER,
BRUCE A. CAMPBELL,
Attorneys for Plaintiff in Error.
JAMES O. MILLER,
WM. WINKELMANN,
A. B. OGLE,
Attorneys for Defendant in Error.
FRED. B. MERRILLS,
Attorney for Defendant in Error.

[Endorsed:] 985/23,560.

346 [Endorsed:] File No. 23,560. Supreme Court U. S., October Term, 1912. Term No. 985. Illinois Central Railroad Co., Pl'ff in Error, vs. Mulberry Hill Coal Company. Stipulation as to printing record. Filed March 15, 1913.

Endorsed on cover: File No. 23,560. Illinois Supreme Court. Term No. 985. Illinois Central Railroad Company, plaintiff in error, vs. Mulberry Hill Coal Company. Filed February 24th, 1913. File No. 23,560.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

No. 118

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

MULBERRY HILL COAL COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD C. KRAMER,
BLEWETT LEE,
JOHN G. DRENNAN,
Attorneys for Plaintiff in Error.

Walter S. Horton
Of Counsel

BURTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

No. 118

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

MULBERRY HILL COAL COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This case will be found reported below in 161 Ill. App., 272 (April 15, 1911), and 257 Ill. Supreme, 80 (Dec. 17, 1912), latter opinion, printed record, 111. Defendant in error, who was the plaintiff below, bases its action upon Section 22 of the Illinois act in relation to fencing and operating railroads, approved March 31, 1874 (Hurd's Rev. Stat. Ill., 1913, Ch. 114, Sec. 84, p. 1955), the material portion of which is as follows:

"Every railroad corporation in the state shall

> furnish, start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging way passengers and freights; and shall take, receive, transport and discharge such passengers and property, at, from and to such stations, junctions and places, on and from all trains advertised to stop at the same for passengers and freight, respectively, upon the due payment, or tender of payment of tolls, freight, or fare legally authorized therefor, if payment shall be demanded, etc."

(Numbers in parentheses refer to pages of the printed record.)

This is an action on the case brought September 1, 1908, in the Circuit Court of St. Clair County, Illinois. Defendant in error bases its action solely upon the statute of the State of Illinois above quoted, as will be seen by the declaration (9) and the instruction to the jury asked by defendant in error. (99)

The declaration alleges that plaintiff in error owned and operated a railroad leading from Freeburg to East St. Louis in St. Clair County, Illinois, and that said road was used for carrying passengers and freight for hire; that defendant in error owned and operated a coal mine located on the railway tracks of plaintiff in error near Freeburg, with shaft, fixtures, machinery and appliances necessary to mine, hoist and dump coal into railroad cars; that plaintiff in error owned a switch track connecting its tracks with defendant in error's mine on which it was the custom to place empty coal cars for defendant in error to load with coal from its mine, and when the cars were so loaded the coal was shipped, under direction of defendant in error, to its customers:

That on the 10th day of January, 1907, defendant in error was enabled to mine and hoist at its said mine and dump into railroad cars 200 tons of coal each working day, and when the capacity of its mine was increased to 425 tons it was enabled to mine and hoist that amount, and when the capacity was increased to 525 tons it was enabled to mine and hoist that amount:

That it was the custom and acted upon by both plaintiff in error and defendant in error, that whenever cars were required to load at defendant in error's mine the defendant in error would give notice to plaintiff in error, on the day before the day on which cars were required, of how many cars would be needed on the succeeding day.

The declaration alleges that on 99 days of the year 1907, beginning on the 10th day of January, defendant in error ordered cars of plaintiff in error which it failed to furnish. The exact number ordered each day is shown in the first paragraph of the declaration (12) and a stipulation (123), and damages are claimed by reason of such failure for expenses necessarily paid out for wages of engineer, mine manager, feed for mules, coal used at mine, and rental value of mine, in the sum of $2,201.92.

To this declaration plaintiff in error pleaded the general issue. (13) A general verdict was rendered for $1,000, which by remittitur was reduced to $716.92. (18)

The testimony in this case showed that defendant in error, during the year 1907, was the owner and operator of a coal mine located near Freeburg, Illinois, not far from East St. Louis, Illinois, upon the St. Louis division of plaintiff in error (20), with a rated capacity fixed by plaintiff in error of 200 tons which was afterwards increased to 425 tons and still further increased to 525

tons; that during said time the plaintiff in error was the owner and operator of an interstate railroad serving thirteen states. (50) At this page a system map will be found in the record showing the states served, and also a map showing the coal mines located on the lines of plaintiff in error's railway in the States of Illinois, Kentucky and Indiana, being 161 in number, divided into six divisions, known as the St. Louis division, Springfield division, Peoria division, Chicago division, Freeport division, and Louisville division, the mine of defendant in error being located on the St. Louis division.

On the 22d day of August, 1906, plantiff in error formulated rules for the rating of all of the mines located upon its lines, and for the distribution of coal cars among them. (52) These rules were in effect until August 1st, 1907, when they were revised. (54) These rules, with the revision, covered the period involved in this suit. Under them plaintiff in error rated the mines according to their respective capacity to produce coal. The coal-hauling equipment was first distributed among the divisions according to the capacity of the mines located in them (51), after which distribution was made in each division among the mines located in it, according to the capacity of the mines. (85) It was customary for all of the operators to make a demand for coal cars up to the capacity of their mines. (21) During the year 1907 plaintiff in error did not have a sufficient amount of coal-hauling equipment on hand to supply all the demands made (56 and 60), and it was customary, during the year 1907, in the mining and marketing of bituminous coal, such as was mined by the defendant in error and is exclusively mined in the State of Illinois, to dump the coal into railroad cars as it is hoisted from the mines, and it remained in the coal car until delivered to the final consumer; in other words, the railroad car was the

warehouse for such commodity, and under normal conditions it was not stored. Therefore, the amount of cars that the railroad company was expected to furnish was fixed rather upon the demand for coal than the actual capacity of its mines. And what is meant by a shortage of coal cars does not necessarily mean that plaintiff in error did not have a sufficient number of cars to supply the trade as the coal would be consumed, but that it would not have a sufficient amount to meet the full demands of the operators, according to the capacity of their mines, and the consumption of coal largely depended upon the prosperity of the country. During the year 1908, immediately following the year in question, plaintiff in error had a surplus of coal cars, averaging 5,913 cars per day, not in use during the year. (62 to 73)

The testimony shows that during the year 1907 plaintiff in error made a distribution of its coal-hauling equipment according to the rules established by it; that in making this distribution, for the convenience of the operators and miners, it distributed the equipment so that the mines would have a full supply upon certain days instead of furnishing a partial supply on all days, and this accounts for defendant in error not having any cars for ninety-nine days in the year. (90)

During the time in question coal was shipped from the mines located on the line of plaintiff in error's railway in the State of Illinois to various states in the Union, sixty per cent. of the entire output being shipped to points outside the State of Illinois (95), and of the coal mined by defendant in error ninety-five per cent. went outside the State of Illinois, and if the cars demanded had been furnished during the time in question 95 per cent. of the coal shipped in them would have gone beyond the State of Illinois. (42)

At the close of all the evidence plaintiff in error submitted a motion asking the court to dismiss the case for want of jurisdiction, because the Interstate Commerce Commission has original jurisdiction of the matters involved in the suit and until it has acted the courts are without jurisdiction. (95) The court overruled this motion.

Plaintiff in error then submitted a motion asking the court to hold that the statute of the State of Illinois upon which defendant in error based its suit, as applied in this suit, is unconstitutional, upon the grounds that it undertakes to regulate interstate commerce and invades a field, the exclusive possession of which has been taken by Congress. (98) The court overruled this motion and submitted the case to the jury.

On the trial the plaintiff in error submitted an interrogatory to the jury which is in the following words:

> "Does the evidence in this case show that the defendant, Illinois Central Railroad Company, durnig the time involved in this suit, distributed all the cars it had available for hauling coal among the operators of coal mines located on its lines of railroad according to the capacity of the mine[s] so located on its lines?" (102)

The jury answered this interrogatory in the negative. (103)

Plaintiff in error contends that the proper distribution of coal cars under circumstances as shown by the evidence in this case, involves such regulations and practices of an interstate railroad company while engaged in interstate commerce as are under the original jurisdiction of the Interstate Commerce Commission; that this case involves the question of discrimination in furnishing coal cars for use in interstate commerce to operators of coal mines located upon an interstate railroad of

which the Interstate Commerce Commission has original jurisdiction; indeed, that jurisdiction belongs to the Commission whether there was discrimination or not; that the statute upon which defendant in error bases its suit, as applied in this case, is unconstitutional. These questions are directly raised on the errors assigned.

ERRORS RELIED UPON. (117)

1. The Supreme Court of the State of Illinois erred in affirming the judgment of the trial court in said cause.

2. The Supreme Court of the State of Illinois erred in holding that the provisions of Section 22 of an act of the General Assembly of the State of Illinois, entitled "An Act in relation to fencing and operating railroads," approved March 31, 1874, in force July 1, 1874, as amended by act approved June 25, 1883, in force July 1, 1883, which said section is in words and figures as follows, to wit:

"84. Must Furnish Cars and Transport Passengars and Property—When.) 22. Every railroad corporation in the state shall furnish, start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging way passengers and freights; and shall take, receive, transport and discharge such passengers and property at, from and to such stations, junctions and places, on and from all trains advertised to stop at the same for passengers and freight, respectively, upon the due payment, or tender of payment of tolls, freight or fare legally authorized therefor, if payment shall be demanded, and such railroad companies shall at all junctions with other railroads, and at all depots where said railroad companies stop

> their trains regularly to receive and discharge passengers in cities and villages, for at least one-half hour before the arrival of, and one-half hour after the arrival of any passenger train, cause their respective depots to be open for the reception of passengers; said depots to be kept well lighted and warmed for the space of time aforesaid. (As amended by act approved June 25, 1883, in force July 1, 1883.)" [Hurd's Rev. St. Ill., 1913, c. 110, sec. 84, p. 1955.]

are not in violation of and not repugnant to Section 8 of Article 1 of the Constitution of the United States, which confers on Congress the exclusive power to regulate commerce among the several states, when applied to the facts in this case.

3. The Supreme Court of the State of Illinois erred in holding that the trial court had jurisdiction of the subject matter involved in this suit and in refusing to hold that the Interstate Commerce Commission of the United States, under the laws of the United States, had exclusive jurisdiction of said matter.

4. The Supreme Court of the State of Illinois erred in refusing to hold that the trial court erred in overruling motion of the said Illinois Central Railroad Company submitted at the close of all the evidence in this case to dismiss said case for want of jurisdiction, which said motion was based upon the grounds that the trial court did not have jurisdiction of said matter and that the exclusive jurisdiction thereof was in the Interstate Commerce Commission, under the laws of the United States.

5. The Supreme Court of the State of Illinois erred in refusing to hold that the trial court erred in refusing to grant motion of the Illinois Central Railroad Company submitted at the close of all the evidence to exclude from the jury all the evidence in this case and

to instruct the jury to return a verdict in favor of said Illinois Central Railroad Company, said motion being based upon the ground that the statute of the State of Illinois upon which this suit is based is in violation of and repugnant to Section 8 of Article 1 of the Constitution of the United States, as to and in relation to the matters involved in this suit.

BRIEF OF ARGUMENT.

I.

THE MOTION OF PLAINTIFF IN ERROR ASKING THAT THIS CASE BE DISMISSED FOR WANT OF JURISDICTION SHOULD HAVE BEEN GRANTED. (95)

1. The furnishing of cars by railroads engaged in interstate commerce comes within the provisions of the Act of Congress to Regulate Commerce.

Section 1 of the Act to Regulate Commerce, as amended, provides:

> "And the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage irrespective of ownership of any contract express or implied for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported, and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor and to establish through routes and just and reasonable rates applicable thereto, and provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto."

The same section further provides:

> "And it is hereby made the duty of all common carriers subject to the provisions of this act, to establish, observe and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just

and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, *the facilities for transportation,* the carrying of personal, sample and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation and practice with reference to commerce between the states and with foreign countries is prohibited and declared to be unlawful,"

This section further provides with reference to switches and cars to be furnished by carriers, as follows:

"Any common carrier subject to the provisions of this Act, upon application of any lateral branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain and operate, upon reasonable terms, a switch connection with any such lateral branch line of railroad or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same, and *shall furnish cars* for the movement of such traffic to the best of its ability, without discrimination in favor of or against any such shipper."

Section 7 of the Act provides as follows:

"Sec. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place

of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act."

In the case of *C. R. I. & P. Railway Co.* v. *Hardwick Farmers' Elevator Company,* 226 U. S., 426 (1913), which involves a statute of the State of Minnesota known as the "Minnesota Reciprocal Demurrage Law," on page 433 the court says:

"We are not, however, called upon to test the merits of these conflicting contentions, since we are of opinion that by the Act of June 29, 1906, 34 Stat. 584, c. 3591, known as the Hepburn Act, amendatory of the act to regulate commerce, Congress has legislated concerning the deliveries of cars in interstate commerce by carriers subject to the act.

In the original act to regulate commerce the term 'transportation' was declared to embrace all instrumentalities of shipment or carriage. By the Hepburn Act it was declared that the term 'transportation' 'shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; *and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor,* and to establish through routes and just and reasonable rates applicable thereto.' (Italics ours.)

The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is of course by these pro-

visions clearly declared. That Congress was specially concerning itself with that subject is further shown by a proviso inserted to supplement paragraph 1 of the original act imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connections 'shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.' Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the Act to Regulate Commerce give remedies for the violation of that duty."

Again, on page 435, the court says:

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumptions that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power. *Southern Ry. Co.* v. *Reid*, 222 U. S., 424."

The Supreme Court of the United States has thus specifically held that the furnishing of cars by railroads

engaged in interstate commerce to Coal Companies located on their lines comes within the provisions of the Act of Congress to regulate commerce.

2. Where the reasonableness of the regulations and practices of an interstate carrier is involved the Interstate Commerce Commission has original jurisdiction of such question, and the furnishing of coal cars by a railroad company engaged in interstate commerce to operators located on its lines, under the circumstances as shown by the evidence in this case, involves such regulation and practice of an interstate carrier of which the Interstate Commerce Commission has original jurisdiction, and until it has acted upon such question the courts are without jurisdiction.

In the case of *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S., 247 (1913), the court directly passes upon this question. In this case it appeared that the railroad company had rates from the mines located in the Clearfield District to various destinations. In some instances the mines were located off the main line and the coal had to be transported to the main line on lateral tracks; in some instances the operators of the mine owned their own engines and hauled the coal from their respective mines to the main line of the railroad, for which the railroad company made certain allowances. In some instances it preferred to perform this service itself and would make no allowances. The plaintiff contended that its regulations and practices in this regard were unreasonable and it was upon this account the suit was brought. Speaking upon the question of jurisdiction, on page 255, the court says:

> "On this hearing, involving a matter of jurisdiction, we cannot pass upon these questions which go to the merits of the controversy. But these claims of the parties emphasize the fact that there are two

classes of acts which may form the basis of a suit for damages. In one, the legal quality of the practice complained of may not be definitely fixed by the statute, so that an allowance, otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable. But to determine that question involves a consideration and comparison of many and various facts, and calls for the exercise of the discretion of the rate-regulating tribunal. The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts, with different juries, the results would not only vary in degree, but might often be opposite in character,—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute. The necessity under the statute of having such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in the Abilene, Pitcairn and Robinson cases, and is referred to here because this record and that in *Pennsylvania R. Co.* v. *International Coal Min. Co.*, just decided, furnish a striking illustration of the results which would follow if the reasonableness of an allowance could be decided by different tribunals."

Again on page 256 the court says:

"It is argued that this conclusion ignores sections 9 and 22, which give the shipper the option of suing in the courts or applying to the Commission. The same argument was made and answered in the Abilene Case by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the Commission, would repeal the many provisions of the statute requiring uniformity and equality. For, manifestly, such uniformity and equality cannot be secured by separate suits before separate tribunals involving the reasonableness of a rate or practice. The evidence might vary and, of course, the verdicts

would vary, with the result that one shipper would succeed before one jury and another fail before a different jury, where the reasonableness of the same practice was involved."

Again, on page 257, the court says:

"But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the Commission or the courts for damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited."

In the case of *Pennsylvania R. R. Co.* v. *International Coal Company*, reported in 230 U. S., 184 (1913), the court clearly distinguishes and points out that class of cases of which the courts have original jurisdiction. They are those in which some positive statute has been violated and in which no settlement of facts with reference to a law is necessary to determine whether or not the law has been violated, such as the determination of the reasonableness or unreasonableness of a practice. Speaking upon this question, on page 196, the court says:

"Under the statute there are many acts of the carrier which are lawful or unlawful, according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a com-

parison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions, are not matters of law. *So far as the determination depends upon facts*, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals.

None of these considerations, however, operates to defeat the courts' jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. * * *

In view of this imperative obligation to charge, collect, and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the commission by any order have made it valid. The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate, and refunded a part to a particular class."

3. This case raises the question of discrimination in furnishing coal cars among the operators located on the

lines of plaintiff in error, first, because if the statute of the State of Illinois upon which this suit is based is to be enforced in favor of certain shippers it must result in the disadvantage of others. Secondly, because the practice act of Hurd's Revised Statutes, Illinois (1913). Chapter 110, Sec. 79, p. 1870, provides as follows:

> "In all trials by jury in civil proceedings in this State, in courts of record, the jury may render, in their discretion, either a general or a special verdict; and in any case in which they render a general verdict, they may be required by the court, and must be so required on request of any party to the action, to find specially upon any material question or questions of fact which shall be stated to them in writing, which questions of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury. Submitting, or refusing to submit a question of fact to the jury when requested by a party, as above provided, may be excepted to and be reviewed on appeal or writ of error, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former shall control the latter and the court may render judgment accordingly."

Now the plaintiff in error submitted a special question of fact to the jury in this case, asking the jury to find whether or not plaintiff in error had distributed its coal-hauling equipment available during the time in question, among the operators of coal mines located on its lines, according to the capacity of the mines, which the jury answered in the negative. (102, 103) This interrogatory is controlling in this case, and raises a question of discrimination.

At the request of plaintiff in error the court submitted to the jury the following instruction (101):

> "The court instructs the jury that it is the duty of a railroad company engaged in furnishing cars to coal mines located on its lines during times when

there is a shortage of coal cars; that is, during a time when it is unable to furnish all of the operators of coal mines located on its lines with all of the coal cars desired and demanded by them—to distribute all of the coal hauling equipment that it has available or can secure for distribution, fairly and equitably among the operators of such coal mines located on the lines of such railroad according to and in proportion to the capacity of the said coal mines so located on its lines to mine and produce coal. And if you believe from the evidence in this case that during the time involved in this suit the defendant Illinois Central Railroad Company did not have a sufficient amount of coal-hauling equipment and cars to furnish all of the operators of coal mines located on its lines with all the cars desired and demanded by them and which they were ready and willing to load with coal if said cars had been furnished as so demanded, and that it did, during said time, distribute all of the coal hauling equipment and cars that it had available or could secure for distribution, fairly and equitably among the operators of said coal mines so located on its said lines according to and in proportion to the capacity of said coal mines to mine and produce coal, then and in such case the defendant discharged its whole duty with reference to furnishing such cars and in such case the defendant would not be liable in this suit."

With this instruction it submitted the interrogatory above referred to. The evidence in this case conclusively shows that plaintiff in error did, during the time in question, distribute its coal hauling equipment according to its established rules. The jury finds that this was not a proper distribution, and that the defendant in error was injured thereby. This necessarily raises the question of discrimination.

There is no question but what the Interstate Commerce Commission has original jurisdiction as to all questions involving discrimination in the charging of rates or the regulations and practices of interstate carriers.

The question of jurisdiction first came before the Supreme Court in the case of *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Company,* reported in 204 U. S., 426 (1907), and required a construction of the Act of Congress to Regulate Commerce before it was amended by the Hepburn Act in 1906. It involved the question of whether or not the courts have the right to pass upon the question of the reasonableness of an interstate rate until that question had been passed upon by the Interstate Commerce Commission. On page 439 the court says:

> "When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This

suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question."

Again the court says, on page 441:

"This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.

Nor is there merit in the contention that section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section when taken alone might sanction such a conclusion, but when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible."

This question next came before the Supreme Court in the case of *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S., 452 (1910). In this case the

Railroad Company undertook to enjoin the action of the Interstate Commerce Commission in which it had prescribed the manner in which coal cars should be distributed by a railroad engaged in Interstate commerce among coal operators located on its line, and the case involves the question of whether or not the Interstate Commerce Commission has the primary right of prescribing the method in which interstate carriers shall distribute coal cars among operators of coal mines located on their lines. This act involves a construction of Section 15 of the Interstate Commerce Act, as amended by the Hepburn Act, which reads as follows (34 Stat. L., 584, 589, C. 3591):

> "That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed."

It was contended in this case by the Railroad Company that the cases in which the Commission had had original jurisdiction were those involving the reasonableness of a rate, such as in the Abilene Cotton Oil Co. case, or discrimination in rates. It therefore became necessary for the court to pass upon the words "regulations" and "practices," as employed in Section 15 of the Act to Regulate Commerce, and the court held that when there was a discrimination in the regulations and practices of a railroad company, such as in the distribution of coal cars, the Commission had original jurisdiction. Speaking upon the construction of the Act, on page 476, the court says:

> "The contention gives to the words found in the earlier part of the section, 'any regulation or practice whatsoever of such carrier or carriers affecting such rates,' a dominant and controlling power so as to cause them to limit every other provision in the section, however general in its language. We do not stop to critically examine the provision relied upon for the purpose of pointing out, as a matter of grammatical construction, the error of the contention, because we think, when the text of the section is taken into view and all its provisions are given their natural significance, it obviously appears that the construction relied upon is without foundation, and that to sustain it would be to frustrate the very purpose which it is clear, when the entire provision is considered, it was designed to accomplish, and thus would be destructive of the plain intent of Congress in enacting the provision. The antecedent construction which the Interstate Commerce Act had necessitated, and the remedial character of the amendments adopted in 1906, all serve to establish the want of merit in the contention relied upon. In addition, to adopt it would require us to hold that Congress, in enlarging the power of the commission over rates, had so drafted the amendment as to cripple and paralyze its power in correcting abuses as to preferences and discrimination which, as this court has

hitherto pointed out, it was the great and fundamental purpose of Congress to further."

In the case of *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Company,* 215 U. S., 481 (1910), the question involved was whether or not the Interstate Commerce Commission had original jurisdiction of discriminations in the regulations and practices of a railroad engaged in interstate commerce in the distribution of coal cars among operators located on its lines. In this case the Supreme Court held that the matter should first be submitted to the Interstate Commerce Commission for its ruling and until this Commission had ruled the courts were without jurisdiction. Speaking upon this question, on page 492 the court says:

"To a consideration of this question it is essential to at once summarily and accurately fix the subject-matter of the alleged grievances and the precise character of the relief required in order to remedy the evils complained of upon the assumption of their existence. As to the first, it is patent that the grievances involve acts of the Baltimore & Ohio Railroad, regulations adopted by that company and alleged dealings by the other corporations, all of which, it is asserted, concern interstate commerce and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the act to regulate commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted, and of the relief which the court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against the act is sought and an order, by way of mandamus, was invoked, and was allowed which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of interstate commerce in the future. When the situation is thus defined we see no escape from the conclusion that the grievances complained of were

primarily within the administrative competency of the Interstate Commerce Commission and not subject to be judicially enforced, at least until that body clothed by the statute with authority on the subject had been afforded by a complaint made to it the opportunity to exert its administrative functions."

Again, in the case of *Robinson* v. *B. & O. R. R. Co.*, 222 U. S., 506 (1912), on page 511 of the opinion the court says:

"It is true, as was urged in argument, that in that case the complaint against the established rate was that it was unreasonable (referring to the Abilene Cotton Oil Company case) while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material. The power of the Commission over the two complaints is the same, one is as likely to become the subject of diverging opinions and conflicting decisions as is the other, and if a court, acting originally upon either, were to sustain it and award reparation, the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards and yet continuing to be the legal rate, obligatory upon both carrier and shipper. Of course, the provision in section 22, as also the provision in section 9, must be read in connection with other parts of the act and be interpreted with due regard to its manifest purpose, and, when that is done, it is apparent that neither provision recognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, Federal or State, in the absence of an appropriate finding and order of the Commission."

In this case the court held that the courts were without jurisdiction until the Commission had passed upon the question.

In the case of *Morrisdale Coal Co.* v. *Penn. R. R. Co.*, 230 U. S., 304 (1913), in speaking upon the question of whether or not the courts have jurisdiction of discrimina-

tion in the practices of a railroad company in the distribution of its coal cars before the Interstate Commerce Commission had passed upon such question, the court, on page 313 of the opinion, says:

> "These rulings as to the validity of a particular practice and the facts that would warrant a departure from a proper rule actually in force, are sufficient to show that the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the *Pitcairn* case, 215 U. S., 481, and in the *I. C. C.* v. *Illinois Central,* 215 U. S., 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. If in those direct proceedings the courts could not pass upon the question of reasonableness of a method of allotting cars neither can it do so as an incident to an action for damages.
>
> In view of the decision in the *Abilene, Pitcairn* and *Robinson Cases* it is unnecessary again to discuss the statute or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable."

The case of *United States of America* v. *Pacific & Arctic Co.,* 228 U. S., 87 (1913), was a criminal proceeding by the United States against certain interstate carriers, charging a violation of the Sherman Anti-Trust Act and the Interstate Commerce Act. The indictment contained six counts; the first and second counts charged a violation of the Sherman Anti-Trust Law, and the third, fourth and fifth charged an unlawful discrimination in the transportation of passengers and freight, in violation of the Interstate Commerce Act.

The District Court held that it was without jurisdic-

tion to entertain or determine the questions involved in the counts charging discrimination, either in a criminal or civil proceeding, until the matters of discrimination by the carrier or shippers or the giving or refusing of joint traffic arrangements had been submitted and passed upon by the Interstate Commerce Commission, relying for its conclusion on the Abilene Cotton Oil Co. case and the Pitcairn Coal Co. case.

The Government sued out a writ of error. The Supreme Court sustained the ruling of the District Court on the counts charging discrimination, in the following language (page 106):

> "The decision of the District Court upon counts 3, 4 and 5 must be determined upon different principles than those which we have just expressed in passing on counts 1 and 2. The District Court, as we have seen, decided that the conduct of the defendants was not subject to judicial review in a criminal or civil case until it had been submitted to and passed upon by the Interstate Commerce Commission. The Government attacks the conclusions with arguments of great strength and contends that it makes the Commission not only the judges of the civil relief that private shippers may be given against the carriers by the Interstate Commerce Act, but gives the Commission the control and practical determination of the criminal provisions of the law. The argument, in effect, is that the conclusion of the District Court confounds the civil and criminal remedies of the law, the private injury and the public injury, resulting from the violations of its provisions. And who, it is asked, will initiate the criminal proceeding and by what proof will it be supported? What degree of proof is to be accorded to the finding of the Commission—presumptive or conclusive? If neither, it is argued, 'it would be senseless to regard such a finding as a condition precedent of the United States to indict.' If, it is asked further, the finding of the Commission is to have either *prima facie* or conclusive effect, against whom is it

to have such effect? If against a defendant, what becomes of the sixth amendment of the Constitution? The argument of the Government is cast in a series of questions which end in the final answer, as it is contended, that under the decision of the District Court the Interstate Commerce Commission 'becomes practically the court of final criminal jurisdiction.'

The contentions of the Government would be formidable, indeed, if the Interstate Commerce Act was entirely criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court, to-wit: *T. & P. Ry.* v. *Abilene Cotton Oil Co.*, and *B. & O. R. R. Co.* v. *Pitcairn Coal Co., supra.* And it would, in our judgment, be an erroneous view to take that the great problems which the act was intended to solve, and the great purposes it was intended to effect, should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights, and obligations dependent upon the act, has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment."

4. The present case presents a good illustration of the propriety of the rule which gives jurisdiction in the first instance to the Interstate Commerce Commission.

In the case of *Louisville & Nashville R. R.* v. *Cook Brewing Co.*, 223 U. S., 70, 83-84 (1912), the case was one of the refusal of an interstate carrier to transport

intoxicating liquors into a state on the ground that by a statute of that state such transportation was forbidden. One of the defenses made was that the plaintiff should have applied to the Interstate Commerce Commission instead of to the courts. Upon this point the court, speaking by the lamented Mr. Justice Lurton, said:

> "Why should the brewing company have made complaint to the Commission. What relief could it afford? There was no tariff question. There was no discrimination against shipments tendered by complainant and like shipments tendered by other brewers to the same points. There was no claim that the commodities tendered were inherently dangerous to transport, or that the railroad company did not have transportation facilities. Evansville was not discriminated against in favor of like shipments to the same points. To say that there was a discrimination between shipments of intoxicants and other commodities does not make a case of discrimination or preference where the denial of such shipments is based, as is the case here, wholly and solely upon an illegal restraint upon that kind of interstate commerce, is to reason in a circle, for the question comes back at last to the validity of the law forbidding such shipments. There was no discrimination if the law was valid, and the result must turn, not upon any administrative question or questions of fact within the scope of the power of the Commission, but upon the validity of the legislation which controlled the action of the carrier. That is a question of general law for a judicial tribunal, and one not competent for the Commission as a purely administrative body.
>
> The decision in the case of *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U. S., 426, is not applicable here. The question there was one of the reasonableness of a rate. Such a question is primarily one of administrative character, and the propriety of a prior resort to the Commission to obtain a ruling upon the question of reasonableness involved the very heart of the whole statute. That there might be uniformity in rate-making necessarily

required a resort to that body as a basis for a common law recovery of an excessive charge."

There will be observed an intimation that if the question had been primarily of an administrative character, the Interstate Commerce Commission would have had jurisdiction, and that a lack of transportation facilities may give rise to a question of administrative character.

The second paragraph of the 1st Article of Section 1 of the Interstate Commerce Act as amended, makes the term "transportation" include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, and makes it the duty of the carrier to furnish transportation so defined upon reasonable request therefor.

Section 8 of the Act imposes a liability for violation of the provisions of the Act, and Section 9 gives authority to make complaint to the Commission for the recovery of damages. It is suggested that where the wrong is a breach of the duty of the carrier to supply itself with a sufficient number of cars for the necessities of interstate commerce, that the question is an administrative one, as the cars upon a railroad system are a unit and their use frequently comprises and affects shippers in many states. One jury might find that the railroad company has already a sufficient number of cars, while another might find that it has not, and the greatest variety of results would follow from the different determinations in scattered tribunals of the one fundamental administrative question whether or not the carrier had, upon the whole, a reasonable number of cars to transact its interstate business.

The result of this reasoning would be that not only where the question is one of discrimination in car supply, but where it is one of sufficiency of car supply, the plain-

tiff should resort in the first instance to the Interstate Commerce Commission for reparation and afterwards, if necessary, to the courts to enforce the award of the Commission. By pursuing this course the same ruling as to the adequacy of the number of cars to conduct interstate commerce would be applied to all shippers, and they would be given that equality of treatment to secure which is the chief purpose of the Interstate Commerce Act. The observation may be added that unless a carrier has enough cars to carry on both interstate and intrastate commerce, since the carrier is in duty bound to carry on the one as well as the other, the carrier will not have enough cars to carry on interstate commerce. The essence of the matter is that the car supply of a carrier is a unit, and for that reason jurisdiction over it properly belongs to the Interstate Commerce Commission.

Already, the Interstate Commerce Commission awards reparation for damages resulting from discriminations practiced by railroad companies in the distribution of coal cars. *Hillsdale Coal & Coke Company* v. *Pennsylvania Railroad Company*, 23 I. C. C., 186 (1912). The measure of damages applied by the Commission, however, does not appear to be as liberal as that adopted by the court in the instant case, which makes no allowance for any shortage of cars, but allows the defendant full damages on the basis that he was entitled to a full car supply every day the mine stood idle. It is obvious that suitors would prefer the jurisdiction of State courts under such circumstances, and since the measure of damages may vary in various States, all of the evils of lack of uniformity which form the basis of the decision in the Abilene case would be likely to result, if the primary jurisdiction of the Commission is denied.

In the case of *Jacoby* v. *Pennsylvania R. Co.*, 200 Fed.,

989 (1912), Judge Thompson reaches the same conclusion as the Commission and expressed the opinion,

> "That the Interstate Commerce Commission had authority, not only to pass upon the lawful and unlawful nature of the practice in this case, but also to make an order of reparation in damages, and that the present suit is properly based upon the award by the Interstate Commerce Commission."

If it is asked what shall be the remedy of a shipper who cannot obtain cars according to his demand for local intrastate shipments, the answer must be at this stage of the law, that in the states having Commissions his remedy, if any, would probably be before the State Railroad Commission, or other proper administrative body—in other states his remedy, if any, would still be in the local courts. The present anomalous situation of the law shows the prime necessity of Congress extending the boundaries of Federal regulation over the whole of this debatable land.

The Interstate Commerce Commission has aptly observed:

> "If the carriers were to equip themselves with cars, motive power, tracks and terminals so as to meet any moment the maximum demand for transportation, the shipping public would be obliged to pay interest upon that investment and for the maintenance of these facilities."
>
> *In re Irregularities in Mine Ratings,* 25 I. C. C. Rep., 286, 293 (1912).

Of what avail, however, will be this wise conclusion, if by the operation of state statutes or even state judicial opinions the local duty to furnish cars on demand is made an absolute one? It is even conceivable that the jurors in certain coal mining districts by the practice of severe verdicts in cases like the present one, may cause the coal mines of their districts to draw cars with mag-

netic power, away from the mines in districts where jurors are more humane. The logic of even-handed justice requires that one tribunal shall pass not only upon the propriety of the allotment of cars but upon the sufficiency of the total quantity of cars. Otherwise the result will inevitably follow that all rulings of the Interstate Commerce Commission as to the propriety of the distribution of cars will be rendered nugatory by the simple operation of a verdict that the total car supply was inadequate for the local needs. No progress can be made by walking with one leg only. Two legs should be allowed the Commission.

According to the Federal rule, railroad companies are not absolutely liable for failure to furnish cars in time of shortage. As was said by the court in *Interstate Commerce Commission* v. *Illinois Central Railroad*, 215 U. S., 452, 460 (1910),

> "Notwithstanding full performance by railway carriers of the duty to have a legally sufficient supply of coal cars, it is conceded that unforseen periods arise when a shortage of such cars to meet the demand for the transportation of coal takes place, because, among other things, *a*, of the wide fluctution between the demands for the transportation of bituminous coal at different and uncertain periods; *b*, the large number of loaded coal cars delivered by a carrier beyond its own line for transportation over other roads consequent upon the fact that the coal produced at a particular point is normally distributed for consumption over an extensive area; and, *c*, because the cars thus parted with are subject to longer detensions than usually obtain in the case of shipments of other articles, owing to the fact that bituminous coal is often shipped by mining operators to distant points to be sold after arrival, and is hence held at the terminal points awaiting sale, or because, owing to the cost of handling coal, and the difficulty of storing such coal, the car in which it is shipped is often used by the shipper or purchaser at the ter-

minal points as a convenient means of storage or as an instrument for delivery, without the expense of breaking bulk, to other and distant points."

The general situation as it in fact exists was noticed by the Interstate Commerce Commission in the case of *Traer* v. *Chicago & Alton Railroad Company*, 13 I. C. C., 451, 458 (1908), when they said:

> "It should be borne in mind that this question of car distribution is of importance only during periods when the carrier is unable to furnish all the cars desired by shippers. Generally speaking, this inability so far as coal shipments are concerned prevails during about four or five months of the winter season, when the demand for coal is greatest and the prices of coal the highest. During the other portion of the year carriers generally have a surplus of idle coal cars."

As stated by Judge Holland in the case of *Logan Coal Co.* v. *Pennsylvania R. Co.*, 154 Fed., 497, 503 (1907),

> * * * "it occurs in the bituminous coal mining industry in certain of the winter months of the year that the extraordinary demand for bituminous coal is far beyond the car capacity of the railroad company to transport, and it is conceded that the railroad company is not required to keep a car equipment sufficiently extensive to meet the maximum output at any part of the year, but that it is only required to furnish car facilities to bituminous coal shippers to meet a demand adjusted and regulated to utilize the company's car equipment with uniformity and regularity throughout the year."

This language is quoted and relied upon by Judge Hunt in *Montana W. & L. Co.* v. *Morley*, 198 Fed., 991, 998 (1912).

The present case illustrates the tendency of some State courts to impose an absolute liability for the entire damage resulting from the shipper not having cars to move his coal when he demanded them [*I. C. R. R. Co.* v. *River & Rail Coal & Coke Co.*, 150 Ky., 489 (1912)], and if

statutes like the present one are to be enforced in the manner of the present case, railroad companies will be compelled to have on hand at all times a sufficient number of cars to carry the peak load, an expense which will ultimately fall upon the public as a part of the operating expenses of the railroad and result in a wasteful superabundance of cars all the rest of the time. To have such a superabundant car supply in the present state of railroad finances would be a counsel of perfection indeed!

One natural result will be that the states having severe statutes or rules will get the cars away from the states where milder remedies prevail.

The logic which has led to holding that the Interstate Commerce Commission has exclusive original jurisdiction to pass upon the reasonableness of rates, and the propriety of regulations for the distribution of cars, leads also inevitably to the conclusion that the Commission must have exclusive original jurisdiction to pass upon the adequacy of car supply. The failure to have sufficient cars is an unreasonable practice affecting the facilities of transportation under Section 1, Par. 4 of the Act, for which reparation may properly be given under Section 16.

II.

THE STATUTE OF THE STATE OF ILLINOIS UPON WHICH THIS CASE IS BASED, AS APPLIED IN THIS CASE, IS UNCONSTITUTIONAL.

The constitution of the United States, in defining the powers of Congress, in Clause 3, Section 8 of Article 1, provides:

> "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Where Congress is silent the state may legislate in aid of and without burdening interstate commerce, but there may be Federal exertion of authority at any time which takes the power from the State and becomes exclusive.

Sou. Ry. Co. v. *Reid*, 222 U. S., 424 (1912).
Sou. Ry. Co. v. *Reid & Beam*, 222 U. S., 444 (1912).
C. R. I. & P. Ry. Co. v. *Hardwick Farmers' Elevator Co.*, 226 U. S., 426 (1913).

In the case of *Southern Railway Co.* v. *Reid*, 222 U. S., 424, on page 436, the court says:

> "It is well settled that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised."

In this case it is held that Congress had taken possession of the matter of regulating interstate commerce by the passage of the Act of 1887 and its amendments.

Again, in the case of *Southern Railway Co.* v. *Reid & Beam*, 222 U. S., 444, at page 447, the court says:

> "We have shown in the opinion in No. 487, *ante*, p. 424, that there need not be directly 'inhibitive Congressional legislation but Congressional legislation which occupies the field of regulation, and thereby excludes action by the State.' *Northern Pacific Ry. Co.* v. *State of Washington, ante*, page 370."

In the case of *C. R. I. & P. Railway Company* v. *Hardwick Farmers' Elevator Company*, 226 U. S., 426, at page 435, the court says:

> "As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power

of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power. *Southern Ry. Co.* v. *Reid,* 222 U. S., 424."

This doctrine is affirmed in the cases of *St. Louis Southwestern Railway Co.* v. *State of Arkansas,* 217 U. S., 136 (1910); *St. Louis, Iron Mountain & Southern Railway Company* v. *Edwards,* 227 U. S., 265 (1913); *Yazoo & Miss. Valley R. R. Co.* v. *Greenwood Grocery Co.,* 227 U. S., 1 (1913).

The present statute of Illinois, however valid when originally enacted. has been superseded by the Interstate Commerce Act, as amended, and since the adoption of the Federal statutes the Illinois Act has become an unconstitutional regulation of commerce when applied as in the present case to punish an interstate carrier for failure to furnish cars to be used in interstate commerce. The remedy on this account is no longer under the State Act, but under the Interstate Commerce Act.

If this action can be maintained on behalf of defendant in error then plaintiff in error is liable in a similar manner to every other coal operator on its lines in Illinois, but not liable as to those in other States.

The Supreme Court of the State of Illinois did not

squarely pass upon the motion to dismiss this suit for want of jurisdiction, but this question was fairly presented to the court, as shown by the record (95), and had already squarely been ruled against the plaintiff in error by the Appellate Court (161 Ill. App., 262). To exercise jurisdiction is to decide that one has it. It has been the universal holding of this court that if a Federal question is fairly presented by the record and its decision is necessary to the determination of the case, such question is before this court for determination even though the State Court avoided it.

Chapman v. *Goodnow's Admr.*, 123 U. S., 540 (1887).

Carondelet Canal & Navigation Co. v. *State of Louisiana*, 233 U. S., 362 (1914).

The furnishing of coal cars to operators of mines by an interstate carrier, such as the Illinois Central Railroad Company, involves complicated and perplexing questions, the settlement of which appropriately comes within the functions of a single administrative body. It is obvious that such matters cannot be satisfactorily settled by the courts. The administrative body can promulgate general rules that will do exact justice to all, while the decisions of courts based upon the verdicts of different juries will vary and cannot treat all parties the same.

As we have said before, a shortage of coal cars does not necessarily mean that the carriers have not a sufficient amount of coal hauling equipment to transport coal as rapidly as it is needed for consumption. It is a well understood fact that the operators of the coal mines in Illinois can mine coal twice as rapidly as it is consumed, and inasmuch as it is not customary to store the coal produced in these bituminous fields and it remains in the railroad car from the time it is hoisted from

the mine until it finally reaches the consumer, the carriers are not really expected to have coal hauling equipment greatly in excess of the demands fixed by the consumption. Therefore, during such times as the year 1907 the operators of coal mines make demands to the full capacity of their mines, expecting that the equipment will be equitably distributed among them, but not to the amount demanded. Thus it becomes important to have this equipment equitably distributed. Inasmuch as there is this over-production, it is quite natural for some of the operators to want more than their equitable share, at the expense of the other operators; and some go as far as defendant in error in this case, and ask that they be given all the cars that they demand, which, of course, if done at all, must be done to the prejudice of other operators similarly situated. As long as selfishness permeates human nature it will be necessary that there be some official regulation of the distribution of coal cars among the operators of coal mines, and we submit that such regulation can rationally be accomplished only through an administrative body.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1914.

No. 118.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,
vs.
MULBERRY HILL COAL COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR DEFENDANT IN ERROR.

FREDERICK B. MERRILLS,
Attorney for Defendant in Error.

Bulletin Advocate Printing Company.

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BRIEF FOR DEFENDANT IN ERROR.

The assignment of errors on the record in this court questions the ruling and decision of the Illinois Supreme Court on the errors assigned in that court on the action and decision of the trial court.

We understand that the assignment of errors on record in an appellate court is the pleading of the party and performs the office of a declaration in an action at law, which the defendant is required to answer, and no other.

Let us examine and see what are the alleged errors of the trial court in the Illinois Supreme Court and substantially reassigned on the record of the United States Supreme Court.

The assignment of errors in the Illinois Supreme Court is as follows:

"And now comes the appellant, Illinois Central Railroad Company by John G. Drennan and Kramer, Kramer & Campbell, its attorneys, and says that in the proceeding aforesaid there is manifest error in this, to-wit:

"1st. The Circuit Court erred in admitting improper, incompetent, immaterial and irrelevant testimony offered on the trial of this cause by appellee over the objections of appellant.

"2nd. The Circuit Court erred in refusing to admit proper, competent, material and relevant testimony offered on the trial of this cause by appellant.

"3rd. The Circuit Court erred in overruling appellant's motion offered at the close of all the evidence to dismiss this suit for want of jurisdiction.

"4th. The Circuit Court erred in overruling appellant's motion offered at the close of all the evidence in this case for the Court to exclude from the jury all the evidence in this case and to instruct the jury to return a verdict in favor of appellant, said motion being based upon the grounds that the statute of the State of Illinois, upon which this suit is based, is unconstitutional as to this appellant in relation to the matters involved in this suit, and because the Court refused to give said instruction.

"5th. The Circuit Court erred in refusing to grant appellant's motion offered at the close of all the evidence to exclude the evidence from the jury in this case, and to instruct the jury to return a verdict in favor of appellant, and because the Court refused to give said instruction.

"6th. The Circuit Court erred in giving to the jury the first, second, third and fourth instructions and each of them offered by appellee.

"7th. The Circuit Court erred in overruling appellant's motion to set aside the verdict of the jury returned in this case, and to set aside the special finding of the jury in said case, and to grant unto appellant a new trial for the reasons therein stated.

"8th. The Circuit Court erred in rendering judgment on the verdict in this case.

"9th. For other good and sufficient reasons.

"Wherefore, appellant, Illinois Central Railroad Company, prays that judgment may be reversed, annulled and held for nothing, and that it may be restored to all things that it has lost by reason thereof."

To the first assignment it is a sufficient answer to say, the Supreme Court committed no error, for the reason that no particular testimony of the kind referred to in the assignment has been pointed out by Plaintiff in Error's counsel in their brief, so that the court could not know what particular testimony counsel is referring to.

To the second assignment, our answer is the same as our answer to the first assignment.

To the third assignment our answer is that the circuit court did not err, and the Supreme Court of Illinois did not err, in affirming the decision of the trial court refusing to dismiss the suit for want of jurisdiction, because the circuit court had jurisdiction of the cause for the reason that this suit was brought for the recovery of damages for a failure to furnish cars to be loaded with coal, and shipped to various destinations, many of which were located in the State of Illinois.

The proof shows conclusively that part of the coal that would have been loaded on the railroad company's cars, had they been furnished, would have been shipped to destinations outside the State of Illinois, and part of it to desti-

nations within the State, hence the motion to dismiss was too broad and was properly overruled. If the matter could have been reached at all by motion to dismiss, the motion should have been specifically confined to that part of the cause of action involving the coal that would have been shipped to destinations outside of the State of Illinois. The motion may be likened to a general demurrer to a declaration containing two counts, one good and the other bad. In such case the motion would have to be overruled. Or it may be likened to a general objection to a witness who is competent to testify as to some matters in issue and incompetent to testify as to others without pointing out wherein his incompetency exists. In such case the objection must be overruled because of his competency to testify as to part of the matters in issue. It is the duty of the objector to point out specifically wherein his incompetency lies.

So if the testimony of a party plaintiff is competent as to one defendant, but not as to others, who defend in a representative capacity, the court cannot exclude the same, but its effect in such case may be limited and controlled by instructions from the court.

Michael J. Eich et al. vs. August Sievers, 73 Ill., 194;
The People vs. Lee, 237 Ill., 272.

In the case at bar evidence of the Interstate Commerce shipments, if the court had no jurisdiction as to those shipments, might by proper instruction have been excluded from the attention of the jury. Most assuredly, as we have shown, a motion to dismiss the suit was altogether improper and therefore properly overruled.

As to the 4th assignment our answer is the statute of Illinois upon which this suit is based is not unconstitutional, for the reason, as we have already shown, that part of the coal would have been intrastate commerce. For the sake of argument, admit that the statute of Illinois is unconsti-

tutional as to the coal that would have constituted interstate commerce. Nevertheless it would be constitutional as to that portion that would have come under the denomination of intrastate commerce. Hence the motion was too broad and was properly overruled, and the court properly refused to give said instruction.

As to the 5th assignment our answer is that the same doctrine set forth in answer to the 4th assignment, *supra*, may be applied.

As to the 6th assignment our answer is that we look in vain in plaintiff's brief for any reason why the instructions excepted to, or any of them, should not have been given to the jury. Hence we take it for granted that this assignment has been abandoned by plaintiff in error.

As to the 7th, 8th and 9th assignments of error our answer is that the motion for a new trial was properly overruled and judgment on the verdict properly rendered, for the reason that the objection suggested in the assignment of said errors have not been specifically pointed out in Plaintiff in Error's brief, and no specific argument made on any point involved in those assignments; hence we dismiss them without further comment.

In Plaintiff in Error's brief we find a contention by the Plaintiff in Error that this is a suit to recover damages for discrimination by the railroad company in distributing its cars. We cannot assent to this proposition, for the reason that there is not a syllable in the declaration, in the plea thereto, the issue presented by the pleadings or the evidence introduced by which it is claimed or even intimated that a recovery is sought for discrimination in distributing cars. It is true counsel for Plaintiff in Error have adroitly constructed a theory of their own, built with their own material to make out a case by which the Defendant in Error may be ousted out of court for the advantage of the Plaintiff in Error. We are unable to find either reason or authority to sustain

the position that plaintiff in the circuit court can be forced to claim damages for discrimination in the distribution of cars, when no such fact existed. Defendant in Error did not claim that it was deprived of its proportion of cars, or that other mines got cars and it none. Discrimination, as generally understood when applied to railroads, consists in giving one shipper an undue or illegal advantage over another in respect to rates, distribution of cars, service or special favors to which he is not legally entitled. No complaint was made by plaintiff in the trial court of any illegal or inequitable distribution of cars.

True, to build up a case of discrimination, Plaintiff in Error obtained an instruction from the court which was wrong and not the law, never was and never will be, and was wholly unresponsive to the issues and the evidence. It also obtained from the court the submission of a special interrogatory to the jury which was entirely foreign to the pleadings and the evidence. If the instruction so obtained from the court is the law of the land, the result will be the bankruptcy of every coal operator on the railroad of Plaintiff in Error. If the railroad company may be excused, because it distributes to the mines what cars it has on hand, the number being wholly insufficient to carry the usual and ordinary traffic or freight offered to it for transportation, then what becomes of the statutory provisions, both of the State of Illinois and the United States, providing that it is the duty of the railroad company to furnish the shipper upon reasonable notice with sufficient vehicles and appliances to carry and transfer all such freight as shall be offered to it at its stations for receiving freight. That the instruction referred to is manifestly wrong, is apparent. That counsel for Plaintiff in Error obtained the sanction of the trial court to an erroneous instruction in the haste incident to trial was wrong, and how Plaintiff in Error can inject into this case a new theory foreign to the issues in this case based upon such erroneous instruction inadvertently given

by the court we cannot understand. No man is permitted to take advantage of his own wrong.

With this we submit the case to the court for its decision and respectfully ask an affirmance of the judgment.

Respectfully submitted,

FREDERICK B. MERRILLS,

Attorney for Defendant in Error.

ILLINOIS CENTRAL RAILROAD COMPANY v. MULBERRY HILL COAL COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 118. Argued January 14, 1915.—Decided June 14, 1915.

A state statute which merely requires a railroad company to furnish cars within a reasonable time after demand made for them, is not such a direct burden upon interstate commerce, as to be void in the absence of legislation on the subject by Congress; and so *held* as to ch. 114, § 84, Rev. Stat. Illinois, 1913.

Whether such a statute, valid when enacted, became an unconstitutional burden on interstate commerce on the enactment of the amendment of the Interstate Commerce Act, not now decided as that point was not raised in either of the state courts.

The state courts have jurisdiction of a case for damages against a carrier for failure to deliver cars in accordance with its own rules for distribution, where the rule itself is not attacked but discrimination against plaintiff notwithstanding the rule is the basis of the suit. *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121.

While the amendment of 1906 to the Interstate Commerce Act gave new rights to shippers, it preserved existing rights and did not supersede the jurisdiction of the state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of administrative power and discretion of the Commission or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive. *Id.*

257 Illinois, 80, affirmed.

THE facts, which involve the liability of a carrier for failure to furnish cars to a coal mining corporation located on its line, are stated in the opinion.

Mr. Blewett Lee, with whom *Mr. Edward C. Kramer*, *Mr. John G. Drennan* and *Mr. Walter S. Horton* were on the brief, for plaintiff in error:

The case should have been dismissed for want of jurisdiction. Congress has preëmpted the field. The reason-

ableness of carriers' practices is for the Commission, especially in cases of discrimination, or of inadequacy of carriers' total car supply. There is conflict between state and Federal rules as to duty of supplying cars.

The Illinois statute as applied to interstate commerce is unconstitutional. The subject has been withdrawn from state authority.

In support of these contentions, see *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362; *Chapman* v. *Goodnow's Admr.*, 123 U. S. 540; *Chicago, R. I. & P. Ry.* v. *Hardwick Elevator*, 226 U. S. 426; *Hillsdale Coal Co.* v. *Penna. R. R.*, 23 I. C. C. 186; *Ill. Cent. R. R.* v. *Mulberry Hill Coal Co.*, 161 Ill. App. 272; *S. C.*, 257 Illinois, 80; *Ill. Cent. R. R.* v. *River Coal Co.*, 150 Kentucky, 489; *In re Irregularities in Mine Ratings*, 25 I. C. C. 286; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Jacoby* v. *Penna. R. R.*, 200 Fed. Rep. 989; *Logan Coal Co.* v. *Penna. R. R.*, 154 Fed. Rep. 497; *Louis. & Nash. R. R.* v. *Cook Brewing Co.*, 223 U. S. 70; *Mitchell Coal Co.* v. *Penna. R. R.*, 230 U. S. 247; *Montana W. & L. Co.* v. *Morley*, 198 Fed. Rep. 998; *Morrisdale Coal Co.* v. *Penna. R. R.*, 230 U. S. 304; *Penna. R. R.* v. *International Coal Co.*, 230 U. S. 184; *St. L., I. M. & S. Ry.* v. *Edwards*, 227 U. S. 265; *St. L., S. W. Ry.* v. *Arkansas*, 217 U. S. 136; *Southern Ry.* v. *Reid*, 222 U. S. 424; *Southern Ry.* v. *Reid & Beam*, 222 U. S. 444; *Tex. & Pac. Ry.* v. *Abilene Cotton Co.*, 204 U. S. 426; *Traer* v. *Chi. & Alton R. R.*, 13 I. C. C. 451; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87; *Yazoo & Miss. Valley R. R.* v. *Greenwood Grocery Co.*, 227 U. S. 1.

Mr. Frederick B. Merrills for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

This was an action brought by defendant in error against plaintiff in error to recover damages for the alleged failure

of the latter to furnish coal cars at plaintiff's mine, located upon the line of defendant's railroad, pursuant to plaintiff's requirements and demands. It was founded upon § 22 of an act of March 31, 1874, in relation to fencing and operating railroads, as amended (Hurd's Rev. Stat. Illinois, 1913, c. 114, § 84, p. 1955). The declaration set forth that plaintiff was the owner of and engaged in operating a coal mine equipped with appliances necessary for the mining of coal, and was possessed of a large amount of coal at the mine; that defendant was the owner of the railroad upon which the mine was located, there being a switch at the mine, etc., and that on certain specified days in the year 1907 plaintiff notified defendant that it was ready and proposed to load certain specified quantities of coal, and needed defendant's cars in which to load it, and that defendant failed to furnish the cars, and by reason thereof plaintiff sustained damages. The plea was the general issue. There was a trial by jury, at which evidence was given tending to prove the averments of the declaration. Defendant's evidence showed that it was engaged in interstate commerce, having lines of railway extending to other States besides Illinois, with coal mines located upon its lines in three States, the greater part of them being in Illinois; that during the time covered by the action plaintiff shipped 95% of its coal into States other than Illinois, and that if the cars demanded by it had been furnished 95% of the coal shipped in them would have gone to points in other States and off the lines of defendant; and that the coal mines located along defendant's line were divided into divisions, and its equipment for hauling coal was first divided among the divisions and afterwards distributed among the coal operators. There was also evidence of a general shortage of coal cars upon the Illinois Central lines during the year 1907; but the reason for this was not clearly shown, and it did not appear that it was attributable to any sudden emergency or to other causes

beyond the control of the carrier. Defendant introduced in evidence its established rules governing the distribution of coal cars during the period covered by the suit, and there was evidence tending to show that these were followed. But it cannot be said that this was conclusive, and it was distinctly negatived by the finding of the jury.

A verdict was rendered in favor of plaintiff, which by remittitur was reduced to $716.92. The resulting judgment was affirmed by the Supreme Court of Illinois (257 Illinois, 80), and the case comes here upon questions raised under the Commerce Clause of the Constitution of the United States and the Act to Regulate Commerce.

1. The fundamental Federal question, and the only one with which the state Supreme Court dealt, is whether the Illinois statute is a direct burden upon interstate commerce and therefore repugnant to the Commerce Clause, irrespective of Congressional action. This was raised by a motion to dismiss and a motion for the direction of a verdict in favor of defendant. The statute, so far as now pertinent, is as follows:

"Every railroad corporation in the State shall furnish, start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging way-passengers and freights; and shall take, receive, transport and discharge such passengers and property, at, from and to such stations, junctions and places, on and from all trains advertised to stop at the same for passengers and freight, respectively, upon the due payment, or tender of payment of tolls, freight, or fare legally authorized therefor, if payment shall be demanded, etc."

The Illinois Supreme Court construed it as follows: "The only requirement of the statute, as applied in this

case or any other case, is, that the railroad corporation shall furnish cars, within a reasonable time after they are required, to transport the property offered for transportation, and what would be a reasonable time in any case would depend upon all the circumstances and conditions existing, including the requirements of the interstate commerce carried on by the corporation."

In that court, *Houston & Tex. Cent. Railroad* v. *Mayes*, 201 U. S. 321, 329, and *St. Louis S. W. Ry.* v. *Arkansas*, 217 U. S. 136, 149, were cited. In the first of these, the state law absolutely required that a railroad should furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, making no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States or in other places within the same State, or any allowance for interference with traffic occasioned by wrecks or other accidents upon the same or other roads; and for any dereliction of the carrier, owing perhaps to circumstances beyond its control, it was made answerable not only to the extent of the damages incurred by the shipper, but in addition to an arbitrary penalty of $25 per car for each day of detention. In the *Arkansas Case*, the rule of the state railroad commission, as applied by the state court, penalized the carrier for delivering its cars to other roads for the movement of interstate commerce pursuant to the regulations of the American Railway Association, because, as the state court concluded, these regulations, although governing ninety per centum of the railroads in the United States, were inefficient and should be disregarded. This court held (p. 149) that the rule of the state court "involved necessarily the assertion of power in the State to absolutely forbid the efficacious carrying on of interstate commerce, or, what is equivalent thereto, to cause the right to efficiently conduct such

commerce to depend upon the willingness of the company to be subjected to enormous pecuniary penalties as a condition to the exercise of the right."

The statute now in question merely requires a railroad company to furnish cars within a reasonable time after demand made for them, and the question, What is a reasonable time? is to be determined in view of the requirements of interstate commerce. That the operation of the statute is thus limited in practice and not merely in theory is shown by the history of the case at bar. Upon a former trial there was a verdict for the plaintiff, and the resulting judgment came under the review of the appellate court (161 Ill. App. 272), which, while ruling in favor of the plaintiff upon the main questions, reversed the judgment and awarded a new trial (p. 282) because of the rejection of evidence offered by the defendant to show that there were times when it had not a sufficient amount of coal cars to supply the demand of all the operators along its lines, that this was the case during the year 1907, and that during this year plaintiff received its fair and just proportion of the cars.

We agree with the conclusion reached by the state court that the Illinois statute is not a direct burden upon interstate commerce, so as to be void in the absence of legislation by Congress.

2. It is here insisted that by reason of the provisions of the Federal Act to Regulate Commerce and amendments (c. 104, 24 Stat. 379; c. 3591, 34 Stat. 584; etc.) the state law, however valid when originally enacted, has become an unconstitutional regulation when applied, as in the present case, to interstate transactions. Reference is made to § 1 of the Act, as amended in 1906 (c. 3591, 34 Stat. 584), which provides: "And the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage . . . ; and it shall be the duty of every carrier subject to the

provisions of this Act to provide and furnish such transportation upon reasonable request therefor." *Chi., R. I. &c. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426, 435; *St. Louis, Iron Mtn. & S. Ry.* v. *Edwards*, 227 U. S. 265; *Yazoo & Miss. R. R.* v. *Greenwood Gro. Co.*, 227 U. S. 1, and other cases of that class, are cited, to which may be added *Charleston & West. Car. Ry. Co.* v. *Varnville Furniture Co.*, decided June 1, 1915, 237 U. S. 597.

As to this point, it is sufficient to say that no such question was raised in either of the state courts. Indeed, after the denial of the motion to dismiss and the motion to direct a verdict, defendant requested, and the trial court gave to the jury, an instruction setting forth almost *in haec verba* the requirements of the state statute, and declaring "that no other or greater duty devolves upon railroad companies to receive and transport freight than mentioned in the statute."

3. The trial court overruled a motion, made by defendant at the close of the evidence, to dismiss the suit for want of jurisdiction: (a) because the cars demanded were to be used in interstate traffic; and (b) because the action involved defendant's duty to deliver cars during a period of time when there was a car shortage, and when plaintiff, and also the other coal operators, were shipping the greater portion of their coal in interstate commerce, and therefore the suit involved a question of the proper method of car distribution for interstate commerce at a time of shortage, authority over which question was vested in the Interstate Commerce Commission, and until that Commission had acted the court was without jurisdiction. The denial of this motion is insisted upon as error; but, under the facts of the case, the ruling is clearly sustained by our recent decision in *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121. In that case, as in this, an interstate carrier was sued in a state court for damages caused by its failure to furnish a shipper with cars in which to load coal for shipment to

points within and without the State; the pleadings alleged that the carrier failed to perform its duty to furnish cars, and also that in violation of a state statute it unjustly discriminated against the shipper by failing to distribute cars in accordance with the carrier's own rule applicable in time of shortage. A judgment having been rendered for damages caused by the unjust discrimination in the distribution of cars, the carrier brought the case here, insisting (1) that the determination of the proper basis for the distribution of cars was a matter calling for the exercise of the administrative power of the Interstate Commerce Commission; (2) that no court had jurisdiction of an action for discriminatory allotment until after the commission had determined that the established rule for distribution was improper; and (3) that no suit could be brought against an interstate carrier for damages occasioned by a failure to deliver cars or for an unjust discrimination in distribution except in a court of the United States. Upon a review of §§ 8 and 9 of the Act to Regulate Commerce and of the proviso in § 22 which declares that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," we held (p. 130) that while the Act gave shippers new rights, it at the same time preserved existing causes of action; that it did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive; that in actions against railroad companies for unjust discrimination in interstate commerce where the rule of distribution itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the authority of the Interstate Commerce Com-

mission; but if the action is based upon a violation or discriminatory enforcement of the carrier's own rule for car distribution no administrative question is involved, and such an action, although brought against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or the Federal courts. And because in that case the action was not based upon the ground that the carrier's rule of car distribution was unreasonable or discriminatory, but that plaintiff was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled even upon the basis of the carrier's own rule of distribution, it was held that the state court had jurisdiction without previous application to the Interstate Commerce Commission.

It is true that the *Puritan Case* arose before the passage of the Hepburn Act of 1906; but there is nothing in the amendments introduced by that Act to affect the jurisdiction of the state court in an action such as the present.

In this case, plaintiff made no attack whatever upon defendant's rules for car distribution. The declaration, indeed, is based wholly upon the statute, and contains no averment of discrimination. It was defendant that endeavored to import the question of car distribution into the case, by introducing the evidence above referred to, and by requesting an instruction (which the court accordingly gave) to the effect that if defendant had not and could not procure sufficient coal cars to furnish all of the operators on its lines with all the cars desired and demanded by them, and did fairly and equitably distribute its available cars among the operators, it discharged its whole duty to plaintiff. But the verdict of the jury in favor of plaintiff negatived the hypothesis of fact upon which this and another like instruction were based.

Judgment affirmed.